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95-1739

Supreme Court, U.S.
FILED
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CLERK

No. ________

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

Ex Parte **KENDALL H. BREEDLOVE,**

Petitioner

ex relatu

Tysons Manor Homeowners Association v. Kendall H. Breedlove

ex relatu

Sky Bryce Association, Inc. v. Kendall H. Breedlove, et al.

PETITION FOR WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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123pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the federal courts below violate the Fifth Amendment's Due Process Clause, or deny Petitioner equal protection under law or deny procedural due process, either by judicial error, or by judicial bias, in failing to obtain a complete, true, properly-authenticated federal district court record on appeal in the instant action?

2. Does the Virginia property owners association lien law (*i.e., Virginia Code (1950),* as amended, *§55-514* through *§55-516*), on its face or by its application in the instant liens, violate the Fourteenth Amendment's Due Process and Equal Protection Clauses, or Article I, § 11, of the Virginia Constitution, or the U.S. Supreme Court's holding as to liens and attachments being subject to due process strictures in *Connecticut v. Doehr*, 501 U.S. 1, 115 L.Ed2d 1, 111 S.Ct. 2105 (1991) or in *U.S. v. James Daniel Good Real Property*, —U.S. —, — L.Ed.2d —, 114 S.Ct. 492, at 500-501 (1993)?

3. Did the Fourth Circuit court of appeals: (1) deprive the Petitioner of his federal constitutional rights of equal protection under law and of due process; (2) deprive the Petitioner of his federal civil rights under 28 USC §1291, 28 USC §2403 (b), 28 USC §2284, and under 28 USC §1738, F.R.E. 901 and F.R.E. 902, taken together; (3) deprive the Petitioner of his entitlements under *Ex Parte PORESKY*, 290 U.S. 30, 78 L.ED. 152, — S.CT. — (1933), and *Gordon v. Leeke,* 574 F.2d 1147 (4th Cir.), cert. denied 439 U.S. 970 (1978); (4) violate the U.S. Supreme Court's holdings in *Coleman v. Thompson,* 501 U.S. 722, 115 L.Ed.2d 640, 111 S.Ct. — (1991), and *Ward v. Board of County Comm'rs,* 253 U.S. 17, 64 L.Ed. 751, 40 S.Ct. 419 (1920); and (5) deny the Petitioner procedural due process, by dismissing under 28 USC §2106 and Fed. R. Civ. P. 4(c) and 4(m) the instant *ex parte* constitutional challenge, without the federal courts performing the jurisdictional procedures of 28 USC §2284 (for requested three-judge court) and 28 USC §2403(b) (for certification and notification to state attorney general of constitutional challenge to state statute), and without effecting correction of the false, incomplete, *uncertified* record on appeal?

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Note: Concurrent challenges are not the same claim in two federal courts. Some challenges are "on its face," some are "by its application."

IN THE
SUPREME COURT OF THE UNITED STATES

Ex Parte KENDALL H. BREEDLOVE,

Petitioner[1]

PETITION FOR WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

Kendall H. Breedlove, the Petitioner in this appeal, respectfully prays that a *writ of certiorari* issue to review the judgments of the United States Court of Appeals for the Fourth Circuit, entered in the above-titled case on January 23, 1996, and February 7, 1996, affirming with modification the trial court's dismissal of the instant action, nine months after its commencement, during the stage of establishing the trial court's jurisdiction, at the first hearing of the first motion.

OPINIONS BELOW

1. The January 23, 1996, decision of the Fourth Circuit court of appeals dismissed Petitioner's *Brief for the Appellant*. This January 23, 1996, *opinion* is one of the decisions appealed herein to the U.S. Supreme Court and the January 23, 1996, *opinion* is reprinted as Appendix Exhibit 2, at pages A3-A4.

a. On its face, the January 23, 1996, *opinion* fails to set forth the written determinations required by the U.S. Supreme Court's holding in *Coleman v. Thompson*, 501 U.S. 722, 115 L.Ed.2d 640, 111 S.Ct — (1991), that the dismissal decision, *itself*, not on a fair and substantive basis, does not abridge any constitutional rights.

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[1] The complete caption of the instant *ex parte* action, as originally filed, is ***Ex Parte* KENDALL H. BREEDLOVE, *ex rel. Tysons Manor Homeowners Association v. Kendall H. Breedlove, ex rel. Sky Bryce Association, Inc. v. Kendall H. Breedlove, et al.*** Through administrative error in the record, but without any judicial action, the caption was altered by federal court employees variously to "Breedlove v. Tysons Manor," in court dockets, whereas the February 10, 1995, dismissal order is captioned, correctly, ***Ex Parte* KENDALL H. BREEDLOVE, *ex rel. Tysons Manor Homeowners Association v. Kendall H. Breedlove, ex rel. Sky Bryce Association, Inc. v. Kendall H. Breedlove, et al.***—and upon appeal to "Breedlove v. Tysons Manor," and, finally, to "Kendall H. Breedlove v. Tysons Manor Homeowners Association; Sky Bryce Association, Incorporated." which had the effect of concealing the *ex parte* nature of the instant action behind an administrative captioning of the case as a *bi partes* suit.

b. On its face, the January 23, 1996, *opinion* fails to set forth that the Fourth Circuit court of appeals discharged its mandatory, statutory duties under 28 USC §2403 (b), which are jurisdictional in nature.

2. The February 7, 1996, decision and *order* of the Fourth Circuit court denied Petitioner's *Sworn Petition for Rehearing*, dated February 2, 1996. This February 7, 1996, *order* is one of the decisions appealed herein to the U.S. Supreme Court and the *order* is reprinted as Appendix Exhibit 4, at page A8.

a. On its face, the February 7, 1996, *order* fails to set forth the written determinations required by the U.S. Supreme Court's holding in *Coleman v. Thompson*, *supra*, that the denial of the *Petition for Rehearing*, letting stand the January 23, 1996, dismissal decision, not on a fair and substantive basis, is a decision which, *itself*, does not abridge any constitutional rights.

b. On its face, the February 7, 1996, *order* fails to set forth that the Fourth Circuit court of appeals discharged its mandatory, statutory duties for 28 USC §2403 (b) certification and notification invoked by the Petitioner's challenge to the constitutionality of the Virginia property owners association lien law, contained in the *Sworn Petition for Rehearing*.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Fourth Circuit, denying Petitioner's *Sworn Petition for Rehearing*, dated February 2, 1996, was entered February 7, 1996. The judgment affirming the lower trial court's dismissal, with modification, was entered January 23, 1996. The jurisdiction of this Court is invoked pursuant to 28 USC §1254.

NOTICE CONCERNING 28 USC §2403 (b)

This Petition contains a challenge to the constitutionality of one or more of Virginia's statutes—the Virginia property owners association lien law, specifically *Virginia Code (1950)*, as amended, *§55-514* through *§55-516*—in an action in which no officer or representative of the State of Virginia is a named party defendant. As such, this *petition* invokes the mandatory procedures prescribed for federal courts by 28 USC §2403 (b), for the U.S. Supreme Court to certify the challenge to the constitutionality of one or more Virginia statutes and to notify the Attorney General of Virginia, which procedures are not subject to any judicial discretion.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the first section of the Fourteenth Amendment of the United States Constitution, as follows:

"* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws**."

And the Fifth Amendment of the United States Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law**; nor shall private property be taken for public use, without just compensation."

Also involved is Article I, § 11, of the Virginia constitution:

"That **no person shall be deprived of his life, liberty, or property without due process of law**; ... that in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. * * *"

Also involved are Virginia's property owners association lien statutes, *Virginia Code (1950)*, as amended, *§55-514* through *§55-516*.

STATEMENT OF THE CASE

1. Petitioner Breedlove suffered significant deprivations of constitutionally-protected rights resulting from private individuals, Tysons Manor Homeowners Association, *et al.*, and Sky Bryce Association, Inc., *et al.*, filing—under Virginia's property owners association lien law—three property owner association liens as ancillary processes, for prejudgment attachment, without constitutional Due Process notice and opportunity to be heard before the liens attached. Each association group sued

Breedlove separately under action in debt for the selfsame claims as in the liens. One association sued in debt prior to filing its lien; the other association sued in debt after filing its lien. Neither association group sued to enforce any of the liens.

2. a. Tysons Manor Homeowners Association, *et al.*, filed its lien against the Petitioner, on a property owned at the time of liening by a third party, Breedlove having sold the property and transferred the deed in the public land records six weeks prior to the Tysons Manor lien being filed.

b. Sky Bryce Association, Inc., *et al.*, filed two liens against the Petitioner, among the second of two groups of liens, totaling 96 property owners association liens against various property onwers, including two liens against the Petitioner. Each of the 96 liens, including the two against Petitioner, is overreaching for liening for more than Virginia Code §55-516 allows.

3. On May 17, 1994, the Petitioner, as complainant, filed *Ex Parte BREEDLOVE*, the instant *ex parte* action, in the U.S. District Court for the Eastern District of Virginia. Complainant Breedlove (1) sought declaration under 28 USC §2201 of the constitutionality of the Virginia Property Owners Association Act, particularly its assessment statute, its lien statute, and its compliance statute, *on their face*, based upon the *Connecticut v. Doehr*, 501 U.S. 1, 115 L.Ed.2d 1, 111 S.Ct. 2105 (1991), holding that state laws which create and enforce liens are subject to the strictures of due process, and (2) requested the application of the *Doehr*-version of the three-part *Mathews* test [*Mathews v. Eldridge*, 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976)], set forth for use in private-party-initiated deprivations.

b. The Virginia POA lien law, *on its face*, does not provide to the lienee either Due Process notice or Due Process opportunity to be heard before the lien attaches and Virginia postdeprivational remedies are inadequate on their face.

4. Additionally, the Petitioner, as complainant in the instant *Ex Parte BREEDLOVE*, sought injunctive relief under 42 USC §1983 against enforcement of such Virginia property owners association lien statutes as the court might declare unconstitutional.

5. At the initiation of the instant *Ex Parte* **BREEDLOVE** action, in good-faith compliance with appropriate due process and comporting with 28 USC §2403 (b), Petitioner Breedlove, as complainant, notified Virginia's Governor and Attorney General of the initiation of the action and furnished a copy of the May 17, 1994, *Complaint* to each of them by first-class, certified mail, postage prepaid [citing therein 28 USC §2403 (b)].

6. a. The Virginia property owners association lien law fails to provide minimal predeprivation safeguards—notice and opportunity to be heard—prior to a property owners association lien attaching. Furthermore, the Virginia property owners association lien law does not provide for the posting of a lienor bond as a predeprivation safeguard. The Virginia property owners association lien law fails to provide postdeprivational remedial rights for redress of damages attributable to erroneous or false or malicious property owners association liens.

b. In addition to there being no predeprivation safeguards under the Virginia property owners association lien law, there are no prescribed *rights* or *entitlements* (either in Virginia statutory law or case law) to postdeprivational routes of redress for damages attributable to property owners association liens. Virginia's postdeprivational remedies for redress of damages caused by erroneous, or false, or malicious property owners association liens are inadequate to the point of nonexistence and do not satisfy the constitutional strictures of due process under *Connecticut v. Doehr, supra*.

c. Moreover, the refusal and dismissal of the appeals of two prior cases by the Petitioner, as plaintiff, in Virginia state courts, and the failure of the U.S. Supreme Court to grant *certiorari* in those two prior cases, creates the holding that, in Virginia, damages attributable to false, fraudulent, forged, perjured, mechanics' liens may not be redressed through causes of action for common-law defamation, statutory defamation, slander of title, malicious prosecution, abuse of process, or civil conspiracy.[2]

d. The Virginia property owners association lien law does not provide to the lienee either due process notice or opportunity to be heard before the lien attaches and Virginia post-deprivational remedies are inadequate on their face.

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[2] ***Breedlove v. Phillips, et al.***, (Va. 19th Cir., Fairfax at law #117967, reh. denied, 1993; refused, Va. record no. 931104 [unpublished], reh. denied, 1994; cert. denied, S.Ct. no. 93-1910, 115 S.Ct. 69, 1994) contains constitutionality challenge to Va. mechanics' lien law; and ***Breedlove v. Hart, et al.***, (Va. 17th Cir., Arlington at law #93-872, reh. denied, 1994; dism'd., Va. record no. 941785 [unpublished], reh. denied, 1995; cert. denied, S.Ct. no. 95-140, 116 S.Ct. 184, 1995) contains challenge to Va. mechanics' lien law.

e. Furthermore, the damages attributable to Virginia property owners association liens may not be redressed through civil rights' actions pursuant to 42 USC §1983. The federal district court for the Eastern District of Virginia dismissed a civil rights' suit by the Petitioner, upon defendants Tysons Manor Homeowners Association, *et al.*, motion to dismiss. The federal district court dismissed for want of action under color of state law (without deciding the constitutional challenge to the Virginia property owners association lien law raised in that suit), which dismissal was affirmed by the Fourth Circuit court of appeals and was denied certiorari by the U.S. Supreme Court.[3]

7. a. In the instant *ex parte* action the federal district court for the Eastern District of Virginia (the trial court) had *in personam* jurisdiction as to the Petitioner and as to the State of Virginia prior to the *dismissal order* of February 10, 1995. The trial judge dismissed not on a fair and substantive basis.

b. The trial judge dismissed for the Petitioner's purported failure to name or to serve any defendants in an *ex parte* action, (1) when the trial court failed to accord the Petitioner the assistance due a *pro se* litigant in bringing any necessary defendants before the court, as set forth by the Fourth Circuit court in *Gordon v. Leeke*, 574 F.2d 1147 (4th Cir.), cert. denied, 439 U.S. 970 (1978); and (2) when the trial court failed *sua sponte* and refused on Petitioner's motion to discharge the court's jurisdictional duties to certify the constitutional challenge contained in the *Complaint*, and to notify the Attorney General of Virginia, pursuant to 28 USC §2403 (b), even after the Petitioner notified the Attorney General of Virginia and the Governor of Virginia with copies of the May 17, 1994, *Complaint*.

c. The federal district court renounced its jurisdiction improperly on March 10, 1995.[4]

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[3] *Kendall H. Breedlove v. Tysons Manor Homeowners Association, et al.*, (E.D. Va., file no. CA-94-647-A, dism'd., 1994; affm'd., C.A.4, docket no. 94-2316, 1995; cert. denied, S.Ct. no. 95-474, 1996).

[4] The federal district court renounced its jurisdiction: (1) without rendering constitutionally-required decisions on claims of violation of federal civil rights and claims of unconstitutionality of Virginia statutes; (2) without making the determinations required by *Coleman v. Thompson*, 501 U.S. 722,

d. By the dismissal, *itself*, the federal district court denied Petitioner of both his federal and Virginia procedural due process and deprived Petitioner of his federal constitutional and federal civil rights and did so without due process.

As to first transmittal of record on appeal—

8. On March 21, 1995, the federal district court transmitted to the Fourth Circuit court four court-generated documents: (a) the "notice of filing" *transmittal form*, dated March 21, 1995 (signed by Jennifer L. Wilson, deputy clerk); (b) the accompanying March 21, 1995, 9:43 am civil docket summary; (c) the "transmittal of record" *transmittal form* (signed by Jennifer L. Wilson, deputy clerk); and (d) the accompanying March 21, 1995, 10:16 am civil docket summary, which purports that the transmitted record is certified.

a. No certification form accompanied the transmittal and the civil docket summary failed to state, "All pleadings accounted for and in order," in conjunction with the "case closed" entry as was the practice of the federal district court in another of Petitioner's appeals from a prior decision of the same federal district court.

b. On March 22, 1995, the federal district court transmitted a civil docket summary as of March 22, 1995, 10:38 am to the Fourth Circuit court. This transmittal to the Fourth Circuit court was accomplished in secret, without a copy of either the March 22, 1995, 10:38 am civil docket summary or its *transmittal form* being furnished to the Petitioner either by the district court or by the Clerk of the Fourth Circuit. In this March 22, 1995, civil docket summary, and in subsequent civil docket summaries, the entries of March 20 and 21, 1995, including the March 21, 1995, entry purporting certification of the record, have been deleted and concealed.

c. During the five-week period following the Petitioner

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115 L.Ed.2d 640, 111 S.Ct. — (1991); (3) without discharging its mandatory 28 USC §2403 (b) duty to certify the challange to the constitutionality of one or more of Virginia's statutes and to notify the Attorney General of Virginia; (4) without procedural due process; (5) without rendering an opinion on the constitutionality of the Virginia property owners association lien law, challenged in the instant action as being unconstitutional; (6) without declaring any defendants and without judicially joining any defendants, pursuant to Fed. R. Civ. P. 19; and (7) without rendering to Patitioner, as *pro se* complainant, the assistance due a *pro se* litigant in bringing any necessary defendants before the court (if any there be), as required by the Fourth Circuit court in *Gordon v. Leeke, supra.*

filing criminal charges with both the Fourth Circuit court and with the FBI against Jennifer L. Wilson for the tampering of federal court records in this case, one or more persons removed the two March 21, 1995, *transmittal forms* and two March 21, 1995, civil docket summaries from the official court records, and concealed or destroyed these four documents, when these four documents were accepted formally into evidence in this case by the Fourth Circuit court denying Petitioner's motion to exclude them from evidence.

9. On March 31, 1995, Petitioner filed *Appellant's Motion to Determine Fair Due Date for Appellant's Brief, Given Delayed Availability of Two Transcripts*, asking that any informal-briefing-procedures order be issued only after the court reporter's certification of filing of the transcripts was received by the Fourth Circuit court. The Clerk of the Fourth Circuit failed to record the filing of this motion in the Fourth Circuit court's general docket, as demonstrated by the absence of any entry for this motion in the Fourth Circuit court's general docket as of January 23, 1996, 3:06 pm. The relevant, page 4 excerpt from that January 23, 1996, general docket, is reprinted as Appendix Exhibit 3, at pages A5-A7. The Fourth Circuit court failed to rule upon or to enter dispositive order on this motion.

10. a. On April 4, 1995, a letter signed on behalf of the Clerk of the Fourth Circuit by Ms. Shirley J. Beasley, deputy clerk, stated:

> "We have received your motion to determine fair due date for appellant's brief.
>
> "The deadline for the transcript to be filed in this case is June 5, 1995. When the transcript has been filed, then an informal briefing schedule will be set and you will be given twenty-one days to complete your informal brief."

b. As of June 5, 1995, the court reporter had failed to file the two transcripts and to certify that fact to the Fourth Circuit court.

11. On June 2, 1995, Ms. Doris R. Casey, the Clerk of the Court for the federal district court of the Eastern District of Virginia, Alexandria Division, worked her last day as Clerk of the Court. Petitioner has filed criminal charges previously and

restates here that one or more persons suborned Ms. Casey to commit perjury in two counts, to certify falsely the records on appeal of the instant *ex parte* action and of the Petitioner's other *ex parte* action, both of which actions challenge the constitutionality of Virginia lien statutes.[5]

12. The Clerk of the Fourth Circuit failed to obtain a correct record on appeal, or to effect correction of the record on appeal, prior to the Fourth Circuit court making a decision based upon that record on appeal. In particular, the Fourth Circuit court failed to rule timely on Petitioner's three motions to correct the record (June 20, August 25, and December 14, 1995, detailed in paragraphs 13, 17, and 19, below), before making the Fourth Circuit court's January 23, 1996, *opinion* decision.

As to the June 20, 1995, motion (first attempt to obtain a correct, complete, certified record)—

13. a. On June 20, 1995, Petitioner filed *Appellant's Motion (a) Objecting Under F.R.E. 902 to Admissibility of District Court's Two Docket Summaries and Two Transmittal Sheets into Evidence; (b) For the Clerk of the Fourth Circuit Cour of Appeals to Effect Correction of the Unattested, Tampered District Court Record (Lacking the 28 USC §1738 Authentication of the Clerk of the Federal District Court); and (c) For Writ of Certiorari to Federal District Court for Complete Record,* dated June 20, 1995.

b. The Fourth Circuit court of appeals failed to rule on this motion in timely fashion, in that:

(1) The office of the Clerk of the Fourth Circuit recorded this motion in its general docket, in the docket entry dated June 22, 1995, mischaracterized as "Motion filed by Appellant Kendall H. Breedlove to amend the record on appeal [2183713-1] [95-1737] (sjb)."

(2) The Fourth Circuit court of appeals denied the June 20,

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[5] Petitioner asserts that this subornation of Ms. Casey to commit perjury arose as a direct consequence of Petitioner's filing in the other *ex parte* action (C.A.4 docket no. 95-1071) the ***Appellant's Motion Under F.R.E. 902 to Admissibility of District Court's Docket Summary into Evidence and For the Clerk of the Fourth Circuit Court of Appeals To Effect Correction of the Unattested, Tampered District Court Record (Lacking the Attestation of the Federal District Court's Clerk),*** dated May 4, 1995., and asserts that Ms. Casey subsequently forfeited her Clerkship as a direct consequence of Ms. Casey refusing to commit perjury and to swear falsely to the verity and completeness of Petitioner's two records on appeal, each of which record was neither true nor complete.

1995, motion for *certiorari* to the federal district court in *opinion* of January 23, 1996—*seven months* after the motion was filed—under the mischaracterization, "motion to amend the record on appeal." There is no evidence available to the Petitioner that the Fourth Circuit court of appeals instituted any investigation into the criminal charges—concerning criminal activities affecting the verity and reliability of the federal district court records under review—after those charges were brought to the judicial attention of the Fourth Circuit court. No *writ of certiorari* was ever issued by the Fourth Circuit court of appeals to the federal district court.

As to filing of transcripts and informal-briefing-procedures order—

14. On June 23, 1995, a letter addressed to the official court reporter and signed on behalf of the Clerk of the Fourth Circuit by Ms. Shirley J. Beasley, deputy clerk, stated:

> "This Court's Transcript Order Acknowledgment set a filing date of June 5, 1995 for the transcript in this case. No modification or extension has been granted. * * * We have not received your certification of filing. * * * If you have not yet filed the transcript, please be aware that a ten percent fee reduction sanction took effect upon June 5, 1995. If the transcript is not filed by July 12, 1995, a twenty percent fee reduction sanction will apply."

15. On July 7, 1995, the court reporter filed the two transcripts with the federal district court and certified that fact to the Fourth Circuit court.

16. On July 29, 1995, the Petitioner filed his *Brief for the Appellant* with the Fourth Circuit court, in response to the court's July 10, 1995, informal-briefing-procedures order for mailing of Petitioner's brief no later than July 31, 1995.

As to the August 25, 1995, motion (second attempt to obtain a correct, complete, certified record)—

17. a. On August 25, 1995, Petitioner filed *Appellant's Motion for the Fourth Circuit Court of Appeals to Comply with 28 USC §1738 and F.R.E. 902 Regarding the Uncertified, Tampered, Incomplete Record of the Federal District Court,* dated August 25, 1995.

b. The Fourth Circuit court of appeals failed to rule on this motion in timely fashion, in that:

(1) The office of the Clerk of the Fourth Circuit recorded this motion in the general docket, in docket entry dated August 29, 1995, mischaracterized as "Motion filed by Appellant Kendall H. Breedlove to file complete record on appeal [2220559-1] [95-1737] (sjb)."

(2) The Fourth Circuit court of appeals denied the August 25, 1995, motion for the court's compliance with 28 USC §1738 and F.R.E. 902 regarding the authentication of the uncertified, tampered, incomplete record of the federal district court in its *opinion* of January 23, 1996—*five months* after the motion was filed—under the mischaracterization, motion "to file a complete record on appeal." No correction to the incomplete, uncertified record of the federal district court was ever made.

18. On August 31, 1995, the federal district court transmitted to the Fourth Circuit court two court-generated documents: (a) the "transmittal of record" *transmittal form* (signed by Jennifer L. Wilson, deputy clerk) and (b) the accompanying August 31, 1995, 10:16 am civil docket summary, which purports that the transmitted record is certified, but which fails to include the phrase, "All pleadings accounted for and in order."

b. A purported *certification form* (signed by Jennifer L. Wilson, deputy clerk) accompanied the transmittal, which *certification form* failed to comply with 28 USC §1738 and F.R.E. 902 for the authentication of court records. The August 31, 1995, 10:16 am civil docket summary failed to state, "All pleadings accounted for and in order," in conjunction with the "case closed" entry as was the practice of the federal district court in another of Petitioner's appeals from a prior decision of the same federal district court.

c. In fact, not all pleadings and material documents filed by Petitioner with the federal district court were transmitted to the Fourth Circuit court in the record on appeal. The record on appeal was incomplete in material respects.

d. During the five week period following the Petitioner filing criminal charges with both the Fourth Circuit court and with the FBI against Jennifer L. Wilson, deputy clerk, for the tampering of federal court records in this case—particularly the falsification of the August 31, 1995, docket summary and forgery of the August 31, 1995, purported *certification form*—one or more persons removed the August 31, 1995, *transmittal form*, and the August 31, 1995, 10:16 am civil docket summary from the official court records, and concealed or destroyed those documents.[6]

As to the December 14, 1995, motion (third attempt to obtain a correct, complete, certified record)—

19. a. On December 14, 1995, Petitioner filed *Appellant's Motion for Appointment of a Magistrate to Examine the Tampered Record on Appeal and Its Purported Certification, To Hear Evidence, and To Determine a True and Accurate Record of Proceedings before the Federal District Court,* dated December 14, 1995.

b. The Fourth Circuit court of appeals failed to rule on this motion in timely fashion, in that:

(1) The office of the Clerk of the Fourth Circuit recorded this motion in the general docket, in docket entry dated December 18, 1995, correctly titled (not characterized) as "Motion filed by Appellant Kendall H. Breedlove A's Motion for Appointment of a Magistrate to Examine the Tampered Record on Appeal and its purported Certification, to hear evidence, and to determine a true and accurate record of proceedings before the Federal District Court [2281137-1] [95-1737] (jlp)."

(2) No correction of the federal district court record was ever made and falsifications in the federal district court record have been perpetuated into the general docket of the Fourth Circuit court. One or more persons at the Fourth Circuit court: (a) has perpetuated the lower court's docket falsifications and erroneous entries into the Fourth Circuit's general docket; and (2) have introduced new falsifications and errors of the Fourth Circuit's general docket, to create anew the false appearance of the appeal of a *bi partes* suit, and to lend support to the

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[6] On October 25, 1995, in response to Petitioner's two written requests of September 21, 1995, and October 10, 1995, the office of the Clerk of the Fourth Circuit had mailed to the Petitioner a copy of the Fourth Circuit court's file original of the August 31, 1995, "transmittal of record" *transmittal form*, bearing the Fourth Circuit court's date-stamped indicia, "FILED Sep 1 9:38 AM '95, U.S. Court of Appeals, Fourth Circuit." On January 23, 1996, when Petitioner examined the Fourth Circuit court's files, this document had disappeared from the official court records, and the August 31, 1995, 10:16 am civil docket summary which it transmitted had disappeared as well.

wrongful dismissal in the January 23, 1996, *opinion*, for purported failure to serve the defendants in an *ex parte* constitutional challenge by a *pro se* litigant.

c. The Fourth Circuit court of appeals denied the Petitioner's December 14, 1995, motion for the appointment of a magistrate to examine the record on appeal and to determine a true and accurate record of proceedings before the federal district court in its *opinion* of January 23, 1996—*one month* after the motion was filed—under the characterization as a motion "to appoint a magistrate to examine the record." No correction to the tampered, incomplete, uncertified record of the federal district court was ever made.

d. The December 14, 1995, motion to appoint a magistrate contained two criminal information *affidavits*, (1) charging one or more persons with suborning one particular employee—Jennifer L. Wilson, deputy clerk—of the federal district court to falsify the August 31, 1995, purported *certification form*, and charging that Jennifer L. Wilson, deputy clerk, succumbed to the subornation and falsified the August 31, 1995, purported *certification form* and wrongfully applied the official seal of the federal district court to forge the document as an official court document, and (2) charging one or more persons with suborning the official court reporter to falsify and to swear falsely to either one or both transcripts of the oral proceedings of February 10, 1995, and March 10, 1995, to create falsely the appearance of a dismissal with prejudice, and charging Edward Donovan McCoy, the official court reporter, with falsifying and swearing falsely to either one or both transcripts.

e. There is no evidence available to the Petitioner that the Fourth Circuit court of appeals instituted any investigation into the criminal charges—concerning the two criminal information *affidavits* affecting the verity and reliability of the federal district court records on appeal and the transcripts then under Fourth Circuit review—after those charges were brought to the judicial attention of the Fourth Circuit court. Instead, the Fourth Circuit court denied the December 14, 1995, motion in the court's January 23, 1996, *opinion*, without comment.

f. When the Petitioner examined the record on appeal in the office of the Clerk of the Fourth Circuit on the afternoon of January 23, 1996, six documents generated by the federal district court and transmitted to the Fourth Circuit court of appeals—three civil docket summaries and three *transmittal* *forms*—(each material to the instant civil appeal and each material evidence to the criminal investigation of the Petitioner's two December 14, 1995, criminal information *affidavits*), were missing from the record on appeal file, concealed or destroyed while entrusted to the custody and sakekeeping of the Clerk of the Fourth Circuit.

g. Also, when the Petitioner examined the record on appeal in the office of the Clerk of the Fourth Circuit on the afternoon of January 23, 1996, ***Complainant's Motion to Vacate February 10, 1995, Order***, dated March 1, 1995, (item 12 in the August 31, 1995, 10:16 am civil docket summary and tab 12 in the record on appeal), was missing from the record-on-appeal file, concealed or destroyed while entrusted to the custody and sakekeeping of the Clerk of the Fourth Circuit.

h. Petitioner filed criminal information *affidavit* number 3, with the Director of the Federal Bureau of Investigation, concerning this concealment or destruction of federal court records at the Fourth Circuit court (an alleged violation of 18 USC §2071) in letter dated February 1, 1996. In letter dated April 12, 1996, from the FBI to Petitioner. the FBI stated it did not have jurisdiction to investigage these criminal charges.

As to Fourth Circuit's dismissal and improper renouncement of jurisdiction—

20. a. Upon appeal of the federal district court's February 10, 1995, dismissal decision, the Fourth Circuit court of appeals had *in personam* jurisdiction as to the Petitioner, as to the *ex relatu* plaintiffs, and as to the State of Virginia.[7]

b. The Fourth Circuit court of appeals renounced its jurisdiction improperly on January 23, 1996.[8]

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[7] a. Notice jurisdiction of the Fourth Circuit court was supplied by Petitioner's: (1) notice of July 29, 1995, to the attorneys of record for each of the two *ex relatu* parties plaintiff, with two copies of the ***Brief for the Appellant*** to each attorney of record; and (2) to the Attorney General of Virginia, with two copies of the ***Brief for the Appellant***, citing therein 28 USC §2403 (b) and comporting with due process; prior to the dismissal of the appeal in the ***opinion*** of January 23, 1996, which dismissed not on a fair and substantive basis, having ignored the tampered district court's record on appeal and the tampering at the Fourth Circuit of Petitioner's case records.

b. Details as to the other elements comprising the ***in personam*** jurisdiction of the Fourth Circuit court are set forth in Appendix Exhibit 13, "Details of Court of Appeals' Jurisdiction," at pages A37-A43.

[8] The Fourth Circuit court renounced its jurisdiction: (1) without rendering constitutionally-required decisions on claims of violation of federal civil rights and claims of unconstitutionality of Virginia statutes; (2) without

c. By the dismissal, itself, the Fourth Circuit court of appeals denied Petitioner of both his federal and Virginia procedural due process and deprived Petitioner of his federal constitutional and federal civil rights, without notice or opportunity to be heard.

21. In its *opinion* of January 23, 1996, the Fourth Circuit court of appeals affirmed the lower court's dismissal, with modification of the dismissal to be without prejudice. The Fourth Circuit court, itself, dismissed under the authority of cited 28 USC §2106 and Fed. R. Civ. P. 4(c) and 4(m).[9] On its face, the January 23, 1996, *opinion:* (a) fails to rule on or to enter dispositive order for Petitioner's March 31, 1995, motion to the Fourth Circuit court, and (b) fails to contain the determinations required by *Coleman v. Thompson, supra.*[10]

22. The lower federal district court's February 10, 1995, *dismissal order* and the January 23, 1996, *opinion* of the Fourth Circuit court of appeals ignored material facts which conferred notice jurisdiction over the State of Virginia upon both the federal district court and upon the Fourth Circuit court.[11]

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making the determinations required by *Coleman v. Thompson, supra*; (3) after failing *sua sponte* to discharge the court's mandatory, jurisdictional duties under 28 USC §2403 (b) to certify the constitutional challenge; (4) without deciding all motions in the case; and (5) without rendering an opinion on the constitutionality of the Virginia property owners association lien law, challenged in the instant action and pleaded as being unconstitutional in the *Brief for the Appellant*, dated July 29, 1995, "Statement of Facts," "B. The relief sought," at page 4; "F. Basis of the Appeal to the Fourth Circuit Couurt of Appeals," paragraph F. 10. f, at page 16, and "Conclusion," in the prayer, at pages 37-38, thereof.

[9] The trial court's February 10, 1995, *dismissal order* states, as follows:

> " For the reasons stated in open court, the complaint is DISMISSED WITH PREJUDICE." [February 10, 1995, *dismissal order*, pp. 1. See copy of *dismissal order* as Appendix Exhibit 10, at page A28, hereto.]

[10] a. On its face, the January 23, 1996, *opinion* of the Fourth Circuit court of appeals fails to acknowledge judicial notice of, to rule upon, or to enter dispositive *order* concerning Petitioner's three motions, dated September 15, 1994, January 27, 1995, and January 30, 1995, which the federal district court failed previously to rule upon or enter dispositive order concerning, at the time the Fourth Circuit court dismissed the instant action with motions undecided.

b. On its face, the January 23, 1996, *opinion* of the Fourth Circuit court of appeals fails to set forth the discharge by the Fourth Circuit court of its mandatory, jurisdictional duty to certify the constitutional challenge to the Virginia property owners association lien law in the instant action, as mandated by 28 USC §2403 (b).

[11] The material facts conferring notice jurisdiction over the State of Virginia upon both district and appeals courts include: (a) that Petitioner, as *ex parte* complainant, notified the Attorney General of Virginia and the Governor of

23. In its *opinion* of January 23, 1996, the Fourth Circuit court of appeals: (a) affirmed the lower court's dismissal, without reaching the merits of the constitutional questions raised in the appeal; (b) let stand the federal district court's dismissal decision; and (3) denied three of Petitioner's motions to correct the record on appeal.[12]

As to Sworn Petition for Rehearing—

24. On February 2, 1995, Petitioner mailed his *Sworn Petition for Rehearing*, via first-class, certified mail (# P 287-723-204) postage prepaid, with copies to underlying *ex relatu* defendants, by their counsels of record, and to the Attorney General of Virginia (via certified mail # P 287-723-205), citing 28 USC §2403 (b), and certifying such in the certificate of service accompanying each petition, at page 21 (the last page) of the *Petition*, following the appendix.

a. The *Sworn Petition for Rehearing* alleged ten new

Virginia of the filing of his May 17, 1994, ***Complaint***, by a copy of the ***Complaint*** sent by first-class, certified mail, postage prepaid, separately to both officials, notifying the representatives of Virginia in a manner comporting with Constitutional Due Process and comporting with 28 USC §2403 (b); (b) that the federal district court failed ***sua sponte*** and refused upon written motion to discharge the mandatory, statutory judicial duties under 28 USC §2403 (b) to certify the challenge to the constitutionality of one or more Virginia statutes and to notify the Attorney General of Virginia; (c) that the Petitioner, as *ex parte* appellant, had previously notified the Attorney General of Virginia of the filing of Petitioner's July 29, 1995, brief in the instant action by two copies of the ***Brief for the Appellant***, sent by first-class, certified mail, postage prepaid to the Attorney General of Virginia—and further by Petitioner sending copies of all motions and pleadings in the instant appeal to the Attorney General of Virginia; (d) that the Petitioner's, as appellant's, notice to the Attorney General of Virginia comports with Constitutional due process and comports with 28 USC §2403 (b) notification; (e) that the Clerk of the Fourth Circuit court of appeals failed to notify the Attorney General of Virginia of the pendency of the instant appeal containing a challenge to the constitutionality of one or more Virginia statutes, as required by Fed. R. App. P. 44 and 28 USC §2403 (b).

[12] The three motions denied by the Fourth Circuit in its January 23, 1996, ***opinion*** are: (1) ***Appellant's Motion (a) Objecting Under F.R.E. 902 to Admissibility of District Court's Two Docket Summaries and Two Transmittal Sheets into Evidence; (b) For the Clerk of the Fourth Circuit Cour of Appeals to Effect Correction of the Unattested, Tampered District Court Record (Lacking the 28 USC §1738 Authentication of the Clerk of the Federal District Court); and (c) For Writ of Certiorari to Federal District Court for Complete Record***, dated June 20, 1995; ***Appellant's Motion for the Fourth Circuit Court of Appeals to Comply with 28 USC §1738 and F.R.E. 902 Regarding the Uncertified, Tampered, Incomplete Record of the Federal District Court***, dated August 25, 1995; and ***Appellant's Motion for Appointment of a Magistrate to Examine the Tampered Record on Appeal and Its Purported Certification, To Hear Evidence, and To Determine a True and Accurate Record of Proceedings before the Federal District Court***, dated December 14, 1995.

allegations which invoke the holding of the U.S. Supreme Court, in *Coleman v. Thompson, supra*, that the Fourth Circuit make determinations that the dismissal decision, *itself*, does not abridge any constitutional rights.

b. The *Sworn Petition for Rehearing* sought rehearing *en banc* and set forth six major and three lesser arguments and allegations of prejudicial error, denial of procedural due process, and denial of equal protection under law.[13]

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[13] The six major and three lesser arguments and allegations in the *Sworn Petition for Rehearing* include:

"(1) The Fourth Circuit court of appeals committed prejudicial error, denied procedural due process, and denied equal protection under law by depriving Petitioner: (a) of his entitlement under *Ex Parte* *PORESKY*, 290 U.S. 30, 78 L.Ed. 152, — S.Ct. — (1933); and (b) of his federal civil right, pursuant to 28 USC §1291; (c) of his entitlement under *Gordon v. Leeke*, 574 F.2d 1147 (4th Cir.), cert. denied, 439 U.S. 970 (1978); and (d) of his federal civil right, pursuant to 28 USC §2284; and did these four deprivations without Due Process.

"(2) The Fourth Circuit court of appeals committed prejudicial error, denied procedural due process, and denied equal protection under law (a) by violating the U.S. Supreme Court's holding in *Coleman v. Thompson*, 501 U.S. —, 115 L.Ed.2d 640, 664, 111 S.Ct. — (1991), by violating the Virginia Supreme Court's holding in *Tharp v. Commonwealth*, 211 Va. 1, 3, — S.E.2d — (1970), by failing to make a determination that dismissing the instant appeal, in and of itself, would not abridge any constitutional rights.

"(3) The Fourth Circuit court of appeals committed prejudicial, reversible error, denied procedural due process, and denied equal protection under law by violating the holding of the U.S. Supreme Court in *Ward v. Board of County Comm'rs*, 253 U.S. 17, 23, 64 L.Ed 751, 40 S.Ct 419 (1920), by disregarding the Court's duty (neglecting or renouncing a jurisdiction conferred by law), after the Fourth Circuit court of appeals possessed *in personam* jurisdiction as to all necessary parties.

"(4) The Fourth Circuit court of appeals committed prejudicial, reversible error, denied procedural due process, and denied equal protection under law by an opinion which ignores both material fact and law in its decision.

"(a) The Fourth Circuit court of appeals' opinion ignored material fact in that: (1) material variance exists between the *caption* of the Fourth Circuit's January 23, 1996, opinion and the *caption* of the federal district court's February 10, 1995, dismissal order; and (2) the opinion's caption conceals the true nature of the instant action as an *ex parte* action; and ignored material law in that the opinion failed either to apply *Ex Parte* *PORESKY*, *supra*, or to distinguish the instant *ex parte* action from that case.

"(b) The Fourth Circuit court of appeals' opinion ignored material fact and law in that the *bi partes* caption of the Fourth Circuit's January 23, 1996, opinion, in the instant *ex parte* action, is derived administratively, not judicially, from a falsified, tampered, incomplete, uncertified record on appeal.

"(c) The Fourth Circuit court of appeals' opinion ignored material fact and law in that the Fourth Circuit court based its opinion upon the false, fraudulent, tampered, incomplete, uncertified record on appeal.

"(5) The Fourth Circuit court of appeals is without jurisdiction to affirm the dismissal by a single trial judge of a matter pleaded as a three-judge matter, without the procedures of 28 USC §2284 being complied with. As such, the

c. The *Sworn Petition for Rehearing* alleges criminal activity by federal court employees and cover-up of criminal activity by federal court employees, against Petitioner and against Petitioner's official court records, in regard to the processing of Petitioner's instant action at the trial court level and at the appellate court level.

d. As a *Sworn Petition for Rehearing,* under oath, the Petitioner's *Sworn Petition for Rehearing,* dated February 2, 1996, also constitutes a criminal information *affidavit,* of which the Fourth Circuit court ignored the criminal charges therein raised against federal court employees under the Fourth Circuit's supervision.

e. The Petitioner set forth good and sufficient reasons for the rehearing, which the Fourth Circuit court of appeals ignored. Those reasons are summarized in the Petitioner's quote, in footnote below, from the *Sworn Petition for Rehearing.*[14]

f. Moreover, Petitioner asserts that one or more persons at the Fourth Circuit court of appeals: (1) tampered the certified mail piece (# P 287-723-204) containing Petitioner's *Sworn Petition for Rehearing,* so as to conceal the fact of the true date of its receipt and (2) wilfully made false entry on the US Postal Service *Domestic Return Receipt,* PS form 3811 (the green

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January 23, 1996, opinion by the Fourth Circuit court of appeals is void for lack of jurisdiction to dismiss.

"(6) The Fourth Circuit court of appeals is without jurisdiction to affirm the dismissal on the instant action containing a challenge to the constitutionality of a Virginia statute, without the procedures of 28 USC §2403(b) being complied with. As such, the January 23, 1996, opinion by the Fourth Circuit court of appeals is void for lack of jurisdiction to dismiss."

[14] " 1. In the Petitioner's judgment, (a) the dismissal decision, *itself,* denies Petitioner's constitutional rights and, therefore, contravenes the holding of the Supreme Court in *Coleman v. Thompson,* 501 U.S. —, 115 L.Ed.2d 640, 111 S.Ct — (1991), by the Fourth Circuit court of appeals' failure to make the required determinations that the dismissal decision, *itself,* does not abridge constitutional rights; and (b) the Fourth Circuit court of appeals has overlooked both material fact and law in its decision, in its January 23, 1996, *opinion*: (1) in that (a) material variance exists between the [*bi partes*] caption of the Fourth Circuit's January 23, 1996, *opinion* and the [*ex parte caption of the*] federal district court's February 10, 1995, dismissal order, (b) in that the *bi partes* caption of the Fourth Circuit's January 23, 1996, *opinion,* in the instant *ex parte* action, is derived administratively, not judicially, from a falsified, tampered, incomplete, uncertified record on appeal; and (c) in that the Fourth Circuit court based its opinion upon the false, fraudulent, tampered, incomplete, uncertified record on appeal; and (3) The January 23, 1996, opinion perpetrates a fraud upon the Petitioner, in that it fails to announce that it is based upon a false, incomplete, tampered, uncertified record on appeal." [*Sworn Petition for Rehearing,* dated February 2, 1996, "Introduction," paragraph 1, at page 1.]

card), falsifying the date of receipt, to defraud the Petitioner.

g. The person making such false entry on the PS form 3811, wilfully and wrongfully entered February 7, 1996, as the false date of receipt of Petitioner's *Sworn Petition for Rehearing*, which date of February 7, 1996, was the 15th day following the January 23, 1996, *opinion*. As such 15th day, the false-date-of-receipt fraud facilitated the Fourth Circuit court's wrongful denial of Petitioner's *Sworn Petition for Rehearing*, as filed untimely.

25. On February 14, 1996, the Fourth Circuit court of appeals issued its *mandate*—that the January 23, 1996, judgment of the court takes effect that day. (For details, **see** copy of the February 14, 1996, *mandate* as Appendix Exhibit 6, at page A12.) On its face, the February 14, 1996, *mandate:* (a) fails to rule on or to enter dispositive order for Petitioner's March 31 1995, motion, and (b) fails to contain the determinations required by *Coleman v. Thompson, supra*.

As to Notice of Appeal to U.S. Supreme Court—

26. On February 22, 1996, also, the Petitioner filed timely, with the Fourth Circuit court of appeals, Petitioner's *notice of appeal* to the U.S. Supreme Court, seeking review of the January 23, 1996, *opinion* and February 7, 1996, *order* denying rehearing, of the Fourth Circuit court and, therein, requested the Fourth Circuit court to stay any *mandate* pending review by the U.S. Supreme Court in the instant action.

27. a. On February 27, 1996, by letter from the Clerk of the Fourth Circuit, signed on behalf of the Clerk by Shirley J. Beasley, deputy clerk, the Clerk's office of the Fourth Circuit court refused to accept Petitioner's notice of appeal and returned to Petitioner a copy of Petitioner's notice of appeal, marked "FILED Feb 26 9:03 AM '96 U.S. Court of Appeals Fourth Circuit," and bearing the handwritten initials "SJB."[15]

b. The Clerk's letter (Appendix Exhibit 7) accompanying the returned *Sworn Petition for Rehearing* cited Local Rule 40(d) as authority for this return action, stating that: "except for timely suggestions for rehearing in banc, cost and attorney fee matters and other matters ancillary to the filing of an application for writ of certiorari with the Supreme Court, the Office of the Clerk shall not receive motions or other papers requesting further relief in a case after the court has denied a petition for rehearing or the time for filing a petition for rehearing has expired." Apparently, the office of the Clerk has determined that a notice of appeal containing a request to stay the mandate is not a matter ancillary to the filing of an application for writ of certiorari to the Supreme Court.

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[15] To review contents of *notice of appeal*, bearing"FILED" indicia, **see** copy of February 22, 1996, *notice of appeal* as Appendix Exhibit 5, at pages A9 - A11. For details of return, **see** copy of February 27, 1996, Clerk's letter as Appendix Exhibit 7, at page A13.

28. The denials of federal procedural due process and deprivation of Petitioner's federal constitutional rights and federal civil rights by the federal district court for the Eastern District of Virginia, Alexandria Division, are demonstrated by the course of proceedings set forth in Appendix Exhibit 9, in "Detailed course of proceedings in the instant *ex parte* action before the trial court," at pages A20-A27.

REASONS FOR GRANTING THE WRIT

I. ***The Fourth Circuit court of appeals: (1) deprived the Petitioner of his federal constitutional rights of equal protection under law and of due process; (2) deprived the Petitioner of his federal civil rights under 28 USC §1291, 28 USC §2403 (b), 28 USC §2284, and under 28 USC §1738, F.R.E. 901 and F.R.E. 902, taken together; (3) deprived the Petitioner of his entitlements under*** **Ex Parte PORESKY** ***and*** **Gordon v. Leeke*****; (4) violated the U.S. Supreme Court's holdings in*** **Coleman v. Thompson,** ***and*** **Ward v. Board of County Comm'rs*****; and (5) denied the Petitioner procedural due process (dismissing under 28 USC §2106 and Fed. R. Civ. P. 4 (c) and 4(m) and refusing to effect correction of the false,*** **uncertified** ***record on appeal) — in that, the Fourth Circuit court committed or condoned acts against the Petitioner and against the Petitioner's causes of action to have an*** **ex parte** ***determination of the constitutionality of the Virginia property owners association lien law, as an entitlement under*** **Ex Parte PORESKY,** ***which acts constitute prejudicial, reversible error.***

1. The Petitioner, as complainant and as appellant, was and is entitled to five types or groups of entitlements and federal civil rights, as set forth below in footnote.[16]

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[16] The Petitioner is and was entitled to :

a. Equal protection under law, even though Petitioner is a member of a class of citizens who challenge the constitutionality of one or more Virginia statutes; and a member of a class of citizens who prosecute their causes of action

2. The Fourth Circuit court of appeals' dismissal, *itself*, embodied in the January 23, 1996, *opinion* memorandum, deprived Petitioner permanently of each of these five groups of federal civil rights and entitlements.

3. The Fourth Circuit court failed to grant Petitioner Due Process before depriving Petitioner of each of the five groups of entitlements and federal civil rights set forth in footnote 15, as referenced in paragraph I.1, above.

4. Each of these five groups of deprivations is permanent, despite the fact that the January 23, 1996, *opinion* modified the federal district court's dismissal to be without prejudice.

5. The Fourth Circuit court of appeals failed to grant to Petitioner either constitutional Due Process or procedural due process before depriving Petitioner permanently of his entitlements and of his federal civil rights.

6. The Fourth Circuit court and the federal district trial court deprived the Petitioner of the cited federal constitutional rights and of the cited federal civil rights to which he was entitled, by their own actions and by allowing their employees to commit acts against the Petitioner and against the Petitioner's causes of action, which acts were wrongful and unlawful.

7. The acts of the employees of the Fourth Circuit court of appeals and of the federal district court are pleaded as such in the text of the argument sections which follow.

II. *The Fourth Circuit court of appeals committed prejudicial, reversible error, denied procedural due process, denied equal protection under law, and demonstrated bias by violating repeatedly the U.S. Supreme Court's holding in* Coleman v.

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in the courts *pro se*, without representation by counsel; and a member of a class of citizens who bring suit against a Virginia attorney, for third-party liability.

b. Constitutional due process, granted by the Fifth Amendment of the U.S. Constitution, in that the trial court denied Petitioner opportunity to be heard before an *impartial* tribunal and in that the Fourth Circuit court denied Petitioner opportunity to be heard before an *impartial* tribunal;

c. Federal civil rights arising under: (1) 28 USC §1291, (2) 28 USC §2403(b), (3) 28 USC §2284, and (4) 28 USC §1738, F.R.E. 901 and F.R.E. 902, taken together; and

d. Federal entitlements created by holdings of federal case law in *Ex Parte* ***Poresky, supra***, and ***Gordon v. Leeke, supra***.

e. Right to procedural due process, in conjunction with the deprivations of federal civil rights under: (1) 28 USC §1291, (2) 28 USC §2403 (b), (3) 28 USC §2284, and (4) 28 USC §1738, F.R.E. 901 and F.R.E. 902, taken together, and the procedural requirements prescribed by those federal statutes and rules.

Thompson, supra, ***in three respects.***

1. The Fourth Circuit court's dismissal, *itself*, abridged one or more of Petitioner's federal constitutional rights.[17]

2. The Fourth Circuit court of appeals failed *sua sponte* to make a determination, consistent with *Coleman v. Thompson, id.*, 115 L.Ed.2d, at 664, that the dismissal, *itself*, of the instant appeal would not abridge any constitutional rights.

3. The Fourth Circuit court of appeals failed to hear the Petitioner's action *de novo*, as is Petitioner's federal civil right under 28 USC §1291, and as was prayed for repeatedly, but instead, only reviewed the lower federal district court's action.[18]

4. The Fourth Circuit court's: (a) failure to consider properly the elements of a cause of action under 28 USC §2201 and (b) dismissal, not on a fair and substantive basis—precluded the Fourth Circuit court of appeals hearing the merits and rendering decisions on the constitutional questions presented.

5. The Fourth Circuit court's affirmance of the lower court's decision, without the Fourth Circuit court addressing Petitioner's case *de novo*, resulted in a wrongful decision.[19]

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[17] The Fourth Circuit court's dismissal violated procedural due process under *Coleman v. Thompson, supra*, and equal protection under law in four respects: (1) by failing to make a determination in the January 23, 1996, *opinion*, that the decision, *itself*, to affirm the district court's dismissal to the instant action and to dismiss the appeal, not on a fair and substantive basis, but on the unfair basis of an uncertified, erroneous, incomplete lower-court record, did not abridge any constitutional rights; (2) by failing to make a determination in the February 7, 1996, *order*, that the decision, *itself*, denying the *Sworn Petition for Rehearing* and letting stand the dismissal of the appeal, not on a fair and substantive basis, did not abridge any constitutional rights; (3) by failing in its review to assure that the federal district court made the determination in its February 10, 1995, *dismissal order*, that the dismissal decision, *itself*, not on a fair and substantive basis, did not abridge any constitutional rights; and (4) by failing and refusing to certify the constitutionality challenge of the instant appeal to the Attorney General of Virginia, pursuant to 28 USC §2403 (b) and Fed. R. App. P. 44.

[18] Prayed for in prayer for *de novo* hearing set forth in *Brief for the Appellant*, dated July 29, 1995, in the prayer, at page 37; and in the *Sworn Petition for Rehearing*, dated February 2, 1996, in the prayer, at page 10.

[19] The Fourth Circuit court's affirmance decision is wrongful because the decision: (a) upheld the lower court's ruling that the Petitioner failed to serve the defendants (in an *ex parte* action) (1) after the lower court failed to declare or to join judicially any necessary defendants (if any there be), pursuant to Fed. R. Civ P. 19, and, thereby, contravened the admonition of the Fourth Circuit court to its subordinate courts—to assist a *pro se* litigant in bringing any necessary parties before the court—as set forth in *Gordon v. Leeke*, 574 F.2d 1147 (4th Cir.), cert. den., 439 U.S. 970 (1978), and (b) upheld the lower

6. These actions and failures of the Fourth Circuit court of appeals, embodied in the January 23, 1996, *opinion* and February 7, 1996, *order* denying rehearing, denied Petitioner procedural due process and violated his federal constitutional rights and federal civil rights.

7. These actions and failures of the Fourth Circuit court of appeals constitute actions which demonstrate not only prejudicial, reversible error, but also demonstrate the Fourth Circuit court's bias against the Petitioner and against Petitioner's causes of action to challenge the constitutionality of the Virginia property owners association lien law in *ex parte* action.

III. The Fourth Circuit court of appeals committed prejudicial, reversible error, denied procedural due process, denied equal protection under law, and demonstrated bias by violating the holding of the U.S. Supreme Court in **Ward v. Board of County Comm'rs, supra,** *by disregarding the Court's duty (neglecting or renouncing a jurisdiction conferred by law), after the Fourth Circuit court possessed* **in personam** *jurisdiction as to all parties, by general appearances and/or by notice comporting with due process and with 28 USC §2403 (b).*

1. The U.S. Supreme Court has held that the duty of courts: "cannot be disregarded without neglecting or renouncing a jurisdiction conferred by the law and designed to protect and maintain the supremacy of the constitution and the laws made in pursuance thereof. *Ward v. Board of County Comm'rs*, 253 US 17, 23, 64 L Ed 751, 40 S Ct 419 (1920). Indeed, the duty arose out of a distinct distrust of state courts, which the Court perceived as attempting to evade federal review."[20]

2. The U.S. Supreme Court has also held: "Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair and substantial basis. If unsubstantial, constitutional obligations may not thus be evaded."[21]

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court without any explanation of the implied duty of the Petitioner to serve the defendants in an *ex parte* action in a constitutional challenge to one or more state statutes; when such implied duty contravenes the holding of the U.S. Supreme Court in *Ex Parte* ***Poresky, supra***.

[20] Cited by Justices Blackmun, Marshall, and Stevens, in their dissent to *Coleman v. Thompson, id.* 115 L.Ed.2d, at 676-77.

[21] *Broad River Power Co. v. South Carolina ex rel. Daniel,* 281 US 537, 540, 74 L Ed 1023, 50 S.Ct 401 (1930), cited by Justices Blackmun, Marshall, and Stevens, in their dissent to *Coleman v. Thompson, id.* 115 L.Ed.2d, at 677.

3. By logical extension of these holdings, *federal* courts cannot evade their constitutional obligations, either.

4. The Fourth Circuit court of appeals possessed *in personam* jurisdiction as to all parties.[22]

5. Thus, having acquired jurisdiction in the instant appeal, the Fourth Circuit court improperly renounced its jurisdiction in the instant appeal, five and 2/3 months later, without hearing the merits of the federal constitutional questions in the appeal.

6. These actions and failures of the Fourth Circuit court of appeals constitute actions which demonstrate not only prejudicial, reversible error, but also demonstrate the Fourth Circuit court's bias against the Petitioner and against Petitioner's causes of action to challenge the constitutionality of the Virginia property owners association lien law in *ex parte* action.

IV. The Fourth Circuit court of appeals committed prejudicial, reversible error, denied procedural due process, denied equal protection under law, and demonstrated bias: (1) by affirming improperly the lower court's failure to discharge its jurisdictional 28 USC §2284 duties; (2) by affirming improperly the lower court's failure to discharge its jurisdictional 28 USC §2403 (b) duties; (3) by itself failing, sua sponte, *to discharge its own, jurisdictional, 28 USC §2403 (b) duties; and (4) by affirming the February 10, 1995,* dismissal order *of the lower court and by itself issuing the January 23, 1996,* opinion *and February 7, 1996,* order *denying rehearing, each of which three orders is void for lack of jurisdiction to dismiss.*

1. Petitioner, as complainant and as appellant, was entitled as a federal civil right: (a) to the application of the mandatory judicial procedure set forth in 28 USC §2284, regarding a three-judge court; and (b) to the application of the mandatory judicial procedure, as set forth in 28 USC §2403 (b) for certification of the constitutional challenge and for notification of the Virginia

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[22] a. Notice jurisdiction of the Fourth Circuit court was supplied: (a) by Petitioner's timely filing of the *Brief for the Appellant*; and (b) by the Petitioner serving two copies of the *Brief for the Appellant* upon the Attorney General of Virginia by first-class, certified mail, postage prepaid, concurrent with filing the *Brief for the Appellant*, as notice comporting with 28 USC §2403 (b) and comporting with constitutional due process.

b. Details as to the other elements comprising the ***in personam*** jurisdiction of the Fourth Circuit court are set forth in Appendix Exhibit 13, "Details of Court of Appeals' Jurisdiction," at pages A37-A43.

Attorney General.[23]

2. The federal courts have deprived Petitioner of his federal civil rights granted under 28 USC §2284 and under 28 USC §2403(b), as follows:

a. The trial court deprived Petitioner wrongfully:

(1) of his federal civil right under 28 USC §2284, after Petitioner had requested a three-judge court formally in the May 17, 1994, *Complaint*; and

(2) of his federal civil right under 28 USC §2403(b), twice, after the federal district court had failed *sua sponte* and refused upon Petitioner's written motion to discharge its mandatory duties under 28 USC §2403(b).

b. The Fourth Circuit court deprived Petitioner wrongfully:

(1) of his federal civil right under 28 USC §2284, in allowing to stand the trial court's dismissal by a single judge of a matter pleaded as a three-judge matter, and for which a formal request for a three-judge court had been made, when the single judge failed to follow the jurisdictional procedures applicable when 28 USC §2284 is invoked (procedures for findings and determinations by which a single-judge may regain jurisdiction to dismiss a matter for which a three-judge court has been requested); and

(2) of his federal civil right under 28 USC §2403(b), after the Fourth Circuit court twice failed *sua sponte* to discharge its mandatory 28 USC §2403(b) and Fed. R. App. P. 44 duties.

3. Thus, the federal courts deprived the Petitioner wrongfully: (a) of his federal civil right under 28 USC §2284[24]

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[23] For authority for Petitioner's civil rights under 28 USC §2403(b). see Appendix Exhibit 21, at pages A77.

[24] This deprivation of Petitioner's federal civil right under 28 USC §2284 occurred in two respects:

a. By dismissing the instant action, without the single, district trial judge having discharged the trial court's 28 USC §2284 duties pertaining to a three-judge court, when the Petitioner had requested a three-judge court in the *Complaint* and in Petitioner's two motions for the review of a single judge's action by a three-judge court.

b. By Fourth Circuit court, itself, failing to review the trial court's 28 USC §2284 duties during the review of the appeal, and letting stand the lower court's dismissal of the instant action by a single district judge, which action was pleaded as being a three-judge matter.

and (b) of his federal civil right under 28 USC §2403 (b),[25] without Due Process—notice and an opportunity to be heard.

4. The trial court's February 10, 1995, *dismissal order* is void and the Fourth Circuit court of appeals' January 23, 1996, *opinion* and February 7, 1996, *order* are each void.[26]

5. a. The Fourth Circuit court still had notice jurisdiction as to Virginia, despite the Fourth Circuit court's failure to discharge its own 28 USC §2403 (b) duties in the instant appeal.[27]

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[25] This deprivation of Petitioner's federal civil right under 28 USC §2403 (b) occurred in three respects:

a. By the trial court dismissing the instant action, without discharging the 28 USC §2403 (b) duties of a federal court when the pleadings of the May 17, 1994, *Complaint* make clear the applicability of 28 USC §2403 (b), and when the Petitioner requested the trial court's compliance with 28 USC §2403 (b), by written motion, which the trial court ignored and failed to rule upon;

b. By the Fourth Circuit court, itself, failing to discharge its own 28 USC §2403 (b) duties, as a federal court, during the review of the appeal, and letting stand the lower court's dismissal of the instant action;

c. By the Fourth Circuit court, itself, failing to discharge its own 28 USC §2403 (b) duties, as a federal court, during the review of the *Petition for Rehearing*, and letting stand the dismissal of the instant appeal.

[26] a. Each of the three orders is void: (1) for lack of the trial court's and appeals court's jurisdiction to dismiss without discharging the mandatory, jurisdictional duties of a federal court under 28 USC §2403 (b); (2) for lack of the trial court's jurisdiction to dismiss a three-judge matter—pleaded as a three-judge matter—by a single judge, without discharging the district court's mandatory, jurisdictional, 28 USC §2284 duties; and (3) for lack of the Fourth Circuit's jurisdiction to affirm a lower court's dismissal by a single judge of a three-judge matter, without any findings and determinations required to be made by the single district judge, under 28 USC §2284, to confer jurisdiction to dismiss upon a single judge.

b For legal authority demonstrating: (a) that the Fourth Circuit court's affirmance of the lower court's failure to discharge its jurisdictional 28 USC §2284 duties was improper, and (b) that the February 10, 1995, *dismissal order*, the January 23, 1996, *opinion*, and the February 7, 1996, *order* denying rehearing are void for lack of jurisdiction, **see** Appendix Exhibit 17, "Relevant Cases Regarding 28 USC §2284," at pages A62-A64.

c. (1) "Under 28 USCS §2403, it is required that a district court, even though it finds that a constitutional question is frivolous, give notice to the Attorney General, leaving to him the decision whether to intervene." [*Wallach v. Lieberman*, 366 F.2d 254, 10 FR Serv 2d 747, 2 ALR Fed 969 (C.A.2, N.Y., 1966), cited in 28 USCS §2403, note 7, "Discretion," at 454.]

(1) "Certification under 28 USCS §2403(b) is duty of court that should not be ignored, even if claim is obviously frivolous or may be disposed of on other grounds." [*Merrill v. Addison*, 763 F. 2d 80 (C.A.2, N.Y., 1985), 28 USCS §2403, note 7, "Discretion," at 454.]

[27] Notice jurisdiction of the Fourth Circuit court was supplied by notice comporting with due process because Petitioner, himself, notified the Attorney General of Virginia, pursuant to 28 USC §2403 (b), with two copies of the *Brief for the Appellant* (citing therein that 28 USC §2403 (b) may be applicable) at the initiation of the appeal in the instant action and furnished that official with copies of subsequent pleadings, and two copies of the *Sworn*

b. Thus, the Fourth Circuit court acquired *in personam* jurisdiction as to the parties, including the *ex relatu* plaintiffs and the Commonwealth of Virginia, even though the court tried to evade obtaining that jurisdiction, and that jurisdiction once obtained could not properly be renounced without deciding the merits of the constitutional questions in the appeal.

6. These actions and failures of the Fourth Circuit court of appeals constitute overt actions which demonstrate not only prejudicial, reversible error, but also demonstrate the Fourth Circuit court's bias against the Petitioner and against Petitioner's causes of action to challenge the constitutionality of the Virginia property owners association lien law.

V. The Fourth Circuit court of appeals committed prejudicial, reversible error, denied procedural due process, denied equal protection under law, and demonstrated bias by failing to effect correction of the false, incomplete, **uncertified** *federal district court record on appeal, and by relying upon that record, to the judicial detriment of the Petitioner.*

1. The Fourth Circuit court of appeals has relied upon the erroneous record of the federal district court and has perpetuated (in Fourth Circuit court records) one or more of the misrepresentations and omissions, constituting three procedural traps, six material concealments, and five material misrepresentations, created in the federal district court's erroneous, incomplete, *uncertified* record in the instant action (as delineated to the Fourth Circuit in Petitioner's June 20, 1995, motion), to the effect that the Fourth Circuit court records in the instant action are also erroneous, to the consitutional detriment of Petitioner.

2. The actions and failures of the Fourth Circuit court and of the lower court constitute actions which demonstrate not only prejudicial, reversible error, but also demonstrate the Fourth Circuit court's bias against the Petitioner and against the Petitioner's causes of action.

3. The actions of the *Cardinal Conspiracy* and of its spawned criminal conspiracies have effected adversely the -istrative processing of the instant action by federal court employees, to the effect of prejudicing the judicial processing and creating a gross miscarriage of justice and a denial of

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Petition for Rehearing, each by first-class, certified mail, postage prepaid, in a manner comporting with 28 USC §2403 (b) and comporting with due process.

Petitioner's federal civil rights. Both the trial court and the Fourth Circuit court of appeals failed to grant either procedural due process, constitutional Due Process, or Equal Protection under law, as a direct consequence of improper interference by civil and criminal conspiracies in the administrative processing: (a) of Petitioner's instant *ex parte* action, (b) of the appeal thereof, and (c) of the sworn petition for rehearing.[28]

CONCLUSION

1. The Fourth Circuit court of appeals' dismissal, *itself*, of the appeal abridged one or more of Petitioner's federal constitutional rights, in that it violated constitutional due process and equal protection under law and denied procedural due process. The Fourth Circuit court ignored the holding of *Coleman v. Thompson, supra*, in its review and dismissal of the *Brief for the Appellant*, dated July 29, 1995, and denial and return of the *Sworn Petition for Rehearing*, dated February 2, 1996.

2. On the faces of the January 23, 1996, *opinion*, and of the February 7, 1996, *order* denying rehearing, the Fourth Circuit court of appeals: (a) failed *sua sponte* to make a determination, consistent with *Coleman v. Thompson, supra*, that the dismissal, *itself*, of the appeal, not on a fair and substantive basis, would not abridge any constitutional rights; and (b) twice failed *sua sponte* to discharge its mandatory duty under 28 USC §2403 (b), prior to letting stand the lower court's dismissal of the instant action, and dismissing the appeal, without rehearing. By so doing, the Fourth Circuit court deprived Petitioner wrongfully of his entitlement to the protection of *Coleman v. Thompson, supra*, and of his federal civil right to the provisions of 28 USC §2403 (b), and did so without Due Process—notice and an opportunity to be heard.

3. Furthermore, the failures of the federal district court and of the Fourth Circuit court of appeals to discharge their judicial

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[28] a. The conspiracy—named by the Petitioner as the *Cardinal Conspiracy*[28]—is a combination of two or more persons for a common, unlawful purpose, to be achieved through means both lawful and unlawful, and implemented through one or more overt acts. For Petitioner's own use, he refers to these matters as the *Cardinal Conspiracy* and its spawn. The choice of the name "cardinal" for the conspiracy was based on the state bird of Virginia as a symbol for Virginia.

b. The purpose or objective of the *Cardinal Conspiracy* is to maintain the enforceability of Virginia laws and associated Virginia judicial procedures and customs which fail to comport with the strictures of Due Process and to evade constitutional review of those Virginia laws and procedures, either by Virginia state courts or by federal courts.

duties pursuant to 28 USC §2403 (b) are jurisdictional and, thus, the February 10, 1995, *dismissal order* of the federal district court and the Fourth Circuit court's January 23, 1996, *opinion* and February 7, 1996, *order* denying rehearing are each void for lack of jurisdiction to dismiss without the courts' discharge of their 28 USC §2403 (b) duties and without hearing the merits of the challenge to the constitutionality of the Virginia property owners association lien law.

4. In the administrative misprocessing of the instant action, court employees: (a) misrepresented the instant *ex parte* action as a *bi partes* suit, by false entries in government records—miscaptioning the civil docket summary, trial dockets, and transmittal forms upon appeal; (b) failed to enter one or more material, filed documents into the federal district court record or into the civil docket summary, thus concealing material proof of notice to Virginia Attorney General; (c) falsified six or more material court-generated documents; (d) falsified one or more transcripts; (e) failed to enter one material motion into the court of appeals' general docket; (f) removed, concealed, or destroyed one material motion and six material, district-court-generated documents from the record-on-appeal file; (g) concealed the true date of receipt of the *Sworn Petition for Rehearing* and made false entry on government records of such materially-false date of receipt; and (h) wrongfully returned to Petitioner the *Sworn Petition for Rehearing*, bearing the "FILED" indicia of the Fourth Circuit, to conceal it from the record.

5. Petitioner asserts that these admisistrative misprocessings of the instant action are prejudicial and were done by court employees, at the behest and subornation of one or more representatives of a criminal civil rights' conspiracy (spawned by the *Cardinal Conspiracy*) of two or more persons, including federal employees, who have conspired wilfully, in violation of 18 USC §241, to injure, oppress, threaten, or intimidate one or more citizens of the United States, and in particular the Petitioner in the instant action, in the free exercise or enjoyment of one or more rights or privileges secured to him by the Constitution or laws of the United States, particularly including those rights and privileges secured by the U.S. Constitution's Fifth Amendment and by 28 USC §1291, 28 USC §2201, 28 USC 2403(b), 28 USC §2284, 42 USC §1983, and by 28 USC §1738, F.R.E. 901 and F.R.E. 902, taken together, among others.

WHEREFORE, Petitioner prays that a *writ of certiorari* issue from this Court to review the judgments of the Fourth Circuit court of appeals in *Ex Parte* ***Kendall H. Breedlove****, ex rel. Tysons Manor Homeowners Association v. Breedlove, ex rel. Sky Bryce Association, Inc. v. Breedlove,* docket no. 95-1737, as to (1) the court's failure to perform jurisdictional 28 USC §2403 (b) duties; (2) its failure to hear *de novo* the instant appeal; (3) its affirmance of the lower court's dismissal ruling based on a void *dismissal order* for Petitioner's purported failure to serve defendants in an *ex parte* action, an order void for the trial judge's failure to comply with 28 USC §2284 or with 28 USC §2403(b); and (4) its failure to control its employees and subsidiary court employees, to assure the impartial processing of Petitioner's case, with integrity.[29]

In the event this *Petition* is granted, Petitioner prays that this Court remand this case to a federal appeals court other than the Fourth Circuit court,[30] with direction for the federal appeals court: (1) to perform its duties under 28 USC §2403 (b); and (2) to make written determinations consistent with *Coleman v. Thompson, supra.*

In the event that the dismissal decision, *itself,* in the instant appeal, is found to have abridged Petitioner's federal constitutional rights, that this Court direct the federal appeals court then: (1) to hear the merits of the appeal; and (2) to render its published opinion, in a manner consistent with the three-part *Mathews* test set forth in *Connecticut v. Doehr, supra,* on the challenges raised in the instant appeal to the constitutionality of the Virginia property owners association lien law, *Virginia Code (1950) §55-514* through *§55-516*; together with such other and further relief as may seem proper to this Court.

Respectfully submitted,

Kendall H Breedlove

Kendall H. Breedlove, *pro se*

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[29] It is imperative that the Supreme Court place no reliance upon any portion of any *general docket* of the Fourth Circuit court, or upon any *civil docket summary* of the federal district court, in the instant action. The Court may only place reliance in detailed examination of the *original* filings made by Petitioner with each court and the *original* orders entered by the courts.

[30] Petitioner suggests the Fifth Circuit for remand based on the demonstrated familiarity of the Fifth Circuit court with the *ex parte* issues herein, through the Fifth Circuit case of *United States v. Merriwether, supra.*

CERTIFICATE OF SERVICE

SS: COMMONWEALTH OF VIRGINIA
County of Fairfax, to-wit:

KENDALL H. BREEDLOVE, being first duly sworn, upon his oath deposes and says that he is a Petitioner filing *pro se*, in this cause, and that on this 22nd day of April, 1996, pursuant to Rule 29.5 (c) of the *Supreme Court Rules*, he mailed three copies each of the ***Petition for Writ of Certiorari*** by first-class mail, postage prepaid, addressed to the counsel of record for the plaintiffs in the underlying *ex relatu* lien actions and suits, who were represented by counsel, as follows:

Mr. John D. McGavin, attorney of record for
underlying *ex relatu* plaintiff Tysons Manor
Homeowners Association and Charlotte M. Schow,
(unnamed, undeclared, and unjoined defendant)
Lewis, Trichilo, Bancroft, McGavin, & Horvath, P.C.
4117 Chain Bridge Road, Suite 400, P.O. Box 22
Fairfax, VA 22030; and

Mr. James V. Ingold, attorney of record for
underlying *ex relatu* plaintiff Sky Bryce
Association, Inc.
Chadwick, Washington, Olters, Moriarty & Lynn, P.C.
9990 Lee Highway, Suite 450
Fairfax, VA 22030

Pursuant to Rule 29.4 (c), citing that 28 USC §2403 (b) may be applicable, he mailed three copies of the *Petition for Writ of Certiorari* by certified mail, postage prepaid, as follows:

The Honorable James S. Gilmore, III
Attorney General of the Commonwealth of Virginia
Supreme Court Building
101 N. 8th Street
Richmond, Virginia 23219

Kendall H Breedlove
Kendall H. Breedlove, *pro se*

THE FOREGOING CERTIFICATE OF SERVICE was subscribed and sworn to before me by Kendall H. Breedlove on the 22nd of April, 1996.

Barbara Ritterpusc
Notary Public

My commission expires: 1/31/96

LAW OFFICES
ROBERT R. DIVELY, ESQ.
8027 LEESBURG PIKE
SUITE 105 N.V.B.A. BUILDING
VIENNA, VIRGINIA 22182

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APPENDIX TO

Ex Parte **KENDALL H. BREEDLOVE,**

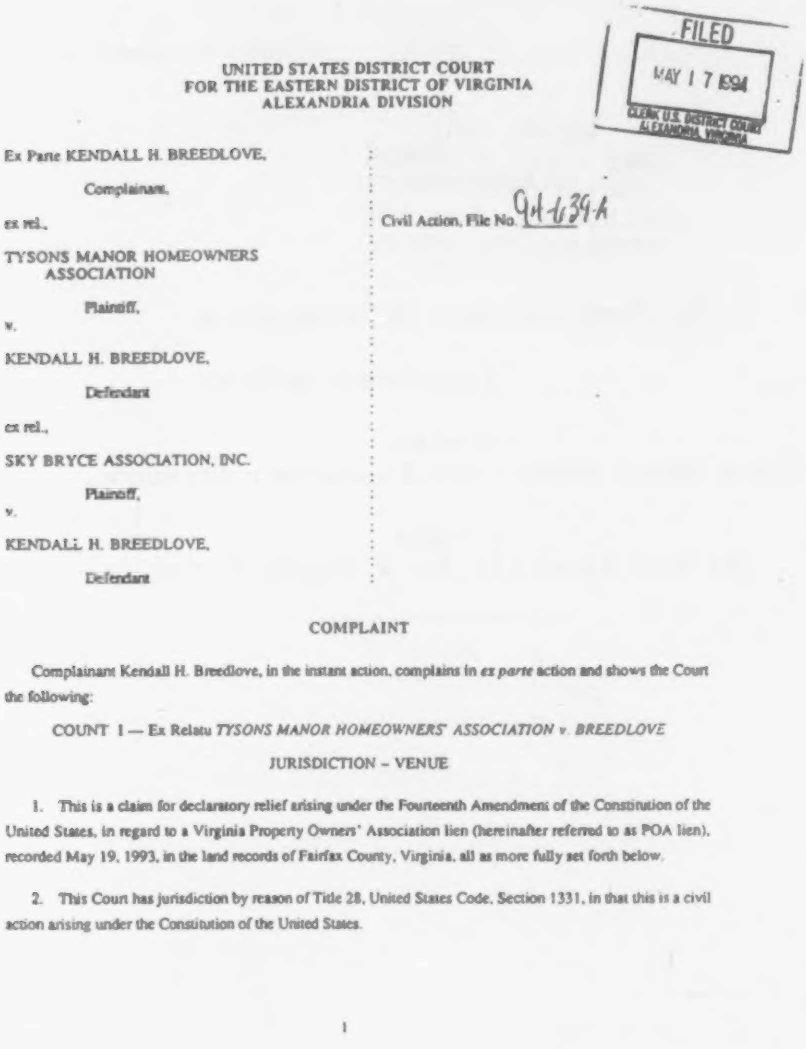
Complainant/Petitioner

ex relatu
Tysons Manor Homeowners Association v. Breedlove,

ex relatu
Sky Bryce Association, Inc. v. Breedlove, et al.

APPENDIX

Exhibit 1 Front Page of May 17, 1994, Complaint Showing Ex Parte Caption[1]



FILED
MAY 17 1994
CLERK U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Ex Parte KENDALL H. BREEDLOVE,
Complainant,
ex rel.,
TYSONS MANOR HOMEOWNERS ASSOCIATION
Plaintiff,
v.
KENDALL H. BREEDLOVE,
Defendant
ex rel.,
SKY BRYCE ASSOCIATION, INC.
Plaintiff,
v.
KENDALL H. BREEDLOVE,
Defendant

Civil Action, File No. 94-639-A

COMPLAINT

Complainant Kendall H. Breedlove, in the instant action, complains in *ex parte* action and shows the Court the following:

COUNT 1 — Ex Relatu *TYSONS MANOR HOMEOWNERS' ASSOCIATION v. BREEDLOVE*

JURISDICTION – VENUE

1. This is a claim for declaratory relief arising under the Fourteenth Amendment of the Constitution of the United States, in regard to a Virginia Property Owners' Association lien (hereinafter referred to as POA lien), recorded May 19, 1993, in the land records of Fairfax County, Virginia, all as more fully set forth below.

2. This Court has jurisdiction by reason of Title 28, United States Code, Section 1331, in that this is a civil action arising under the Constitution of the United States.

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[1] Exhibit 1 shows there are no named defendants in the original May 17, 1994, *Complaint.* During the 9 months prior to the court's dismissal of the action, for Petitioner's failure to serve any defendants, the federal district court failed to declare any defendants and failed to judicially join any defendants, pursuant to Fed. R Civ. P. 19. Petitioner filed no amended complaints.

***Exhibit 2** Unpublished January 23, 1996, Opinion of the Fourth Circuit Court of Appeals, now being appealed*[2]

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-1737

KENDALL H. BREEDLOVE,
Plaintiff - Appellant,

versus

TYSONS MANOR HOMEOWNERS ASSOCIATION;
SKY BRYCE ASSOCIATION, INCORPORATED,
Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Leonie M. Brinkema, District Judge. (CA-94-639-A)

Submitted : January 11, 1996 Decided: January 23, 1996

Before RUSSELL, HALL, and WILKINSON, Circuit Judges.

Affirmed as modified by unpublished per curiam opinion.

Kendall H. Breedlove, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

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[2] Exhibit 2 shows this *opinion* captioned as a *bi partes* suit for an action which was filed *ex parte*, captioned as *Ex Parte Kendall H. Breedlove* in the complaint, for which there are no named or declared or judicially-joined defendants, and for which the February 10, 1995, dismissal order, as entered, is captioned *Ex Parte Kendall H. Breedlove*. To review the February 10, 1995, dismissal order, see Exhibit 10, *post*.

Exhibit 2, continued[3]

PER CURIAM:

Appellant appeals from the district court's orders dismissing his civil action and denying his motion to vacate the court's dismissal order. We have reviewed the record and the district court's opinion rendered from the bench and find no reversible error. Accordingly, we affirm on the reasoning of the district court that Appellant failed to establish that the complaint was served on any Defendant. However, we modify the district court's order to reflect that the dismissal is without prejudice. See 28 U.S.C. § 2106 (1988); Fed. R. Civ. P. 4(c), (m). We deny Appellant's motion to amend the record on appeal, to file a complete record on appeal, and to appoint a magistrate to examine the record. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED AS MODIFIED

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[3] Note that, on its face, the ***opinion*** fails to set forth any compliance by the Fourth Circuit court's with 28 USC §2403 (b), for certification of a constitutional challenge to a Virginia statute and for notification of the attorney general of Virginia. In fact, the Fourth Circuit court failed to comply with 28 USC §2403 (b). Also note that, on its face, the ***opinion*** fails to set forth the determinations required by ***Coleman v. Thompson, supra***, that the dismissal decision, ***itself***, does not abridge any constitutional rights.

Exhibit 3 Excerpt from General Docket of the Fourth Circuit Court as of January 23, 1996 3:06 pm, Page 4[4]

95-1737 Breedlove v. Tysons Manor et al.[5]

3/24/95	Docketing statement filed by Appellant Kendall H. Breedlove [2136771-1] T/S needed: y; T/S already on file: n. [95-1737] (sjb)[6]
3/24/95	Transcript order filed for Edward D. McCoy. [95-1737] (sjb)[7]
3/24/95	Transcript order acknowledgment filed. Pages: 6. Transcript due on 6/5/95 for Edward D. McCoy. T/S certification due on 6/5/95 for Edward D. McCoy [95-1737] (sjb)
3/30/95	Civil case docketed. (sjb)[8]

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[4] Exhibit 3 demonstrates (1) the failure of the Clerk of the Court to issue the 28 USC §2403 (b) certification and notification to the attorney general of Virginia, pursuant to Fed. R. App. P. 44, at the commencement of the appeal; (2) the incomplete nature of the Fourth Circuit general docket, omitting Petitioner's first motion from the record and omitting the first, 3/21/95 filing by the federal district court of the record on appeal; and (3) the mischaracterizations of Petitioner's motion titles, concealing the nature of two motions in the official court record.

[5] This is not the appeal of a *bi partes* suit. Petitioner's docketing statement, dated 3/23/95, captioned *Ex Parte Kendall H. Breedlove, ex rel. Tysons Manor Homeowners Association v. Breedlove, ex rel. Sky Bryce Assoc., Inc. v. Breedlove*, sets forth in response to question F, related cases, that *Breedlove v. Tysons Manor Homeowners Association, et al.*, (C.A.4 docket no. 94-2316) is a related case.

[6] The instant appeal contains a constitutional challenge to a Virginia statute, in a case in which no official of Virginia is named a defendant, making 28 USC §2403 (b) applicable. The docketing statement sets forth in response to question D, question of first impression, that the instant action contains two questions of first impression: whether the Virginia Property Owners Association Act, particularly Va. Code §55-514 through §55-516, *on its face* and *by its application* is violative of the Due Process and Equal Protection Clauses of the 14th Amendment of the U.S. Constitution.

[7] Petitioner filed copy of the *transcript order*, dated March 17, 1995 (and mailed that day to the court reporter), as part of Petitioner's docketing statement, dated March 23, 1995.

[8] The general docket fails to show entry for the first filing by the federal district court of the record on appeal, transmitted 3/21/95. Petitioner learned from Ms. Sharon Wiley, case manager at the Fourth Circuit court, that Petitioner's case was not on the Fourth Circuit court's computer as of 3/29/95, but would be by the end of March. Ms. Wiley confirmed that no docketing letter could be issued until the appeal was on the computer. Ms. Wiley confirmed that either the filing of the record on appeal or the filing of the transcript certification by the court reporter would trigger the appeal being

3/30/95	Docketing notice issued. [95-1737] (sjb)
4/2/95	*Motion filed by Appellant Kendall H. Breedlove* "A's Motion to Determine Fair Due Date for A's Brief, Given Delayed Availability of Two Transcripts," *dated 3/31/95 {This entry, missing in the 1/23/96 3:06 pm copy of the general docket, was added by Petitioner for completeness.}* [9]
6/22/95	**Motion** filed by Appellant Kendall H. Breedlove **to amend the record on appeal** [2183713-1] [95-1737] (sjb)[10]
7/10/95	Certification transcript filed in district court by Edward D. McCoy on March 17, 1995. [95-1737] (sjb)
7/10/95	Informal briefing order filed. [95-1737] Informal brief due 7/31/95 for Kendall H. Breedlove (sjb)
8/3/95	Informal brief filed by Appellant Kendall H. Breedlove. Proof of service [Y/N]?: y. [2204851-1] [95-1737] (sjb)[11]

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placed on the computer and the issuance to a *pro se* appellant of an informal-briefing-procedures order granting 21 days for appellant to file his *brief.* As a result of the telephone conversation with Ms. Wiley on 3/29/95, and the implication that an informal-briefing-procedures order would be issued requiring submission of Petitioner's brief on or about 4/20/95, Petitioner filed his 3/31/95 motion to determine a fair due date for his appellant's *brief.*

[9] The general docket fails to show entry for Petitioner's motion to determine a fair due date for Appellant's *brief,* even though Ms. Shirley J. Beasley, deputy clerk, confirmed the court's receipt of the motion in letter from the Clerk of the Fourth Circuit to Petitioner, dated 4/4/95. That Clerk's letter states, in part, "When the transcript is filed, then an informal briefing schedule will be set and you will be given twenty-one days to complete your informal brief." For more details, **see** "Statement of the Case," paragraphs 9 - 10, at pages 7-8, *ante.*

[10] Note the bolded mischaracterization of Petitioner's motion which was entitled: *Appellant's Motion (a) Objecting Under F.R.E. 902 to Admissibility of District Court's Two Docket Summaries and Two Transmittal Sheets into Evidence; (b) For the Clerk of the Fourth Circuit Court of Appeals to Effect Correction of the Unattested, Tampered District Court Record (Lacking the 28 USC §1738 Authentication of the Clerk of the Federal District Court); and (c) For Writ of Certiorari to Federal District Court for Complete Record,* dated June 20, 1995. **See** and contrast this mischaracterization with the quoted, correct titling of Petitioner's December 14, 1995, motion in the docket entry of 12/18/95, entered by a different deputy clerk (initials: jlp).

8/29/95	**Motion** filed by Appellant Kendall H. Breedlove **to file complete record on appeal** [2220559-1] [95-1737] (sjb)[12]
9/1/95	Record on appeal filed. Pleadings: Vol. 1 T/S: Vols. 2, 3. [95-1737] (sjb)
12/18/95	Motion filed by Appellant Kendall H. Breedlove " **A's Motion for Appointment of a Magistrate to Examine the Tampered Record on Appeal and its purported Certification, to hear evidence, and to determine a true and accurate record of proceedings before the Federal District Court**. " [2281137-1] [95-1737] (jlp)[13]
1/23/96	Opinion ruling denying motion for general relief [2281137-1], denying motion to file complete roa [2220559-1], denying motion to amend the record [2183713-1] [95-1737] (sjb)[14]
1/23/96	Unpublished per curiam opinion filed. [95-1737] (sjb)
1/23/96	Judgment order filed. Decision: affirmed. [95-1737] (sjb)

Docket as of January 23, 1996 3:06 pm Page 4

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[11] Petitioner filed a formal, typeset, bound ***Brief for the Appellant***, in 6 1/8" x 9 1/4" format, compliant with Fed. R. App. P. 28(a), 31(b), and 32, having 38 pages of primary text and 89 pages of appendices.

[12] Note the bolded mischaracterization of Petitioner's motion which was entitled: *Appellant's Motion for the Fourth Circuit Court of Appeals to Comply with 28 USC §1738 and F.R.E. 902 Regarding the Uncertified, Tampered, Incomplete Record of the Federal District Court*, dated August 25, 1995. **See** and compare this mischaracterization with the quoted, correct titling of Petitioner's December 14, 1995, motion in the docket entry of 12/18/95.

[13] Note the bolded, quoted, correct titling of Petitioner's motion, not a mischaracterization of the motion. Petitioner's motion was dated December 14, 1995.

[14] Note the characterization in the January 23, 1996, *opinion* of the Petitioner's December 14, 1995, motion for a magistrate to correct the tampered record as a motion for general relief, concealing the rationale for the motion and the significance of its denial. **See** and contrast this characterization with the quoted, correct titling of Petitioner's December 14, 1995, motion in entry of 12/18/95.

Exhibit 4 ***Unpublished February 7, 1996, Order of the Fourth Circuit Court of Appeals, now being appealed***[15]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
February 7, 1996

No. 95-1737
CA-94-639-A

KENDALL H. BREEDLOVE
Plaintiff - Appellant

v.

TYSONS MANOR HOMEOWNERS ASSOCIATION;
SKY BRYCE ASSOCIATION, INCORPORATED,
Defendants - Appellees

ORDER

The appellant has filed an untimely petition for rehearing and suggestion for rehearing in banc. This Court strictly enforces the time limits for filing petitions for rehearing and suggestions for rehearing in banc.

The Court denies the petition for rehearing and suggestion for rehearing in banc as untimely filed.[16]

For the Court - By Direction
/s/ Bert M. Montague, CLERK

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[15] Exhibit 4 shows: (1) that the *Sworn Petition for Rehearing* was denied on procedural ground, as untimely filed, not on a fair and substantive basis; and (2) that the Fourth Circuit court failed to make the determinations required by the U.S. Supreme Court in ***Coleman v. Thompson, supra***, that the dismissal decision, ***itself***, does not abridge any constitutional rights, when the *Sworn Petition for Rehearing* contained allegations specifically invoking the holding of ***Coleman v. Thompson, supra***. The untimeliness was faked, then used to dismiss procedurally because the *Sworn Petition for Rehearing* alleged, among other things, "a pattern of judicial conduct demonstrating a conspiracy of silence to maintain enforceability of unconstitutional Virginia law and to evade federal constitutional review, resulting in denial of procedural due process to Complainant and converted into denial of Complainant's constitutional rights and federal civil rights," which pattern of conduct included the federal district court for the Eastern District of Virginia.

[16] On information and belief, one or more persons at the Fourth Circuit court of appeals falsified the date of receipt of the the certified-mail package (#P 287-723-204) containing the *Sworn Petition for Rehearing*, misrepresenting that the *petition* was received on February 7, 1996 (the 15th day after the January 23, 1996, *opinion*—thus untimely) rather than when actually delivered on February 6, 1996 (the 14th day after the January 23, 1996, *opinion*—thus timely). Petitioner has filed complaint with the Postal Service.

Exhibit 5 Petitioner's February 22, 1996, Notice of Appeal [17]

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SJB

FILED

Ex Parte **KENDALL H. BREEDLOVE**,	FEB 26 9:03AM '96
	US COURT OF APPEALS
Appellant,	FOURTH CIRCUIT
ex relatu,	Docket No. 95-1737
Tysons Manor Homeowners Association v. Kendall H. Breedlove	
ex relatu,	
Sky Bryce Association, Inc. v. Kendall H. Breedlove	

APPELLANT'S NOTICE OF APPEAL

COMES NOW the Appellant, Kendall H. Breedlove, *pro se*, and states as follows for his Notice of Appeal:

1. Appellant declares his intention, in compliance with the Federal Rules of the Supreme Court, to file an appeal with the Supreme Court of the United States, or to seek a writ of certiorari from that court, from the final determination by this Court:

a. In order dated January 23, 1996, affirming the federal district court's dismissal decision, with modification; and

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[17] Exhibit 5 shows the "FILED" indicia of the Fourth Circuit court, and the handwritten initials "*SJB*," on the timely-filed *Appellant's Notice of Appeal*, which document the Clerk of the Fourth Circuit returned to Petitioner (along with the certified-mail envelope (#P 252-970-184) in which it was filed, postmarked February 22, 1996), by Clerk's letter dated February 27, 1996 (see Exhibit 7, *post*, to review Clerk's letter). The Petitioner interprets this return action by the Clerk as an apparent refusal—a wrongful refusal—to admit to record the *Notice of Appeal* (containing a request to recall and stay the mandate pending review by the U.S. Supreme Court) as not being ancillary to the filing of an application for writ of certiorari with the U.S. Supreme Court. The instant *Notice of Appeal* is a document similar in material respects to previous *Notices of Appeal* filed by Petitioner with the Fourth Circuit court in other appeals, which the Clerk has accepted and admitted to record without comment or return.

b. In order dated February 7, 1996, denying *Appellant's timely-filed, Sworn Petition for Rehearing,* dated February 2, 1996, and suggestion for rehearing en banc.

2. Appellant states that his Constitutional rights to due process, to equal protection under law, and to civil trial by jury have been denied to him and that he has been denied procedural due process. Appellant states that the U.S. Court of Appeals for the Fourth Circuit—without Due Process—has deprived Appallant, permanently, of his federal civil rights under 28 USC §1291, under 28 USC §2403 (b), under 28 USC §2284, and under 28 USC §1738, F.R.E. 901 and F.R.E. 902, taken together, and has deprived Appellant, permanently, of his entitlement created by the U.S. Supreme Court's holding in *Ex Parte PORESKY,* 290 U.S. 30, 78 L.Ed. 152, — S.Ct. — (1933) to seek in *ex parte* action declaratory judgment of the constitutionality of state statutes to which he has been subjected in actual controversy, when he has standing to raise such challenge and when his case has justiciability.

3. Appellant asks that the U.S. Court of Appeals for the Fourth Circuit recall and stay its mandate, dated February 14, 1996, pending review by the Supreme Court of the United States in the instant action.

Respectfully submitted,

(signed) *Kendall H. Breedlove*
Kendall H. Breedlove, *pro se*

CERTIFICATE

The undersigned hereby certifies that he caused one copy of the foregoing **Appellant's Notice of Appeal** to be sent by first-class mail, postage prepaid, addressed to the counsel of record for the plaintiffs in the underlying *ex relatu* suits, who were represented by counsel in the underlying *ex relatu* suits, although these *ex relatu* plaintiffs were not named, or judicially-declared, or judicially-joined as parties defendant in the instant *ex parte* action, as follows:

Mr. John D. McGavin, attorney of record for
Ex Relatu Plaintiffs Tysons Manor Homeowners
Association and Charlotte M. Schow,
Lewis, Trichilo, Bancroft, McGavin, & Horvath, P.C.
4117 Chain Bridge Road, Suite 400, P.O. Box 22
Fairfax, VA 22030; and

Mr. James V. Ingold, counsel of record for *Ex Relatu*
Plaintiff Sky Bryce Association, Inc.
Chadwick, Washington, Olters, Moriarty & Lynn, P.C.,
9990 Lee Highway, Suite 450
Fairfax, Virginia 22030

and, pursuant to Fed. R. App. P. 44 and 28 USC §2403 (b), citing that 28 USC §2403 (b) may be applicable, in that the instant action contains a challenge to the constitutionality of the Virginia property owners association lien law, one copy to be sent by first-class mail, postage prepaid to the Attorney General of Virginia, addressed to him at the following addresses:

The Honorable James S. Gilmore, III
Attorney General of Virginia
Supreme Court Building
101 N. 8th Street
Richmond, Virginia 23219

on this **22nd** of February, 1996.[18]

(signed) *Kendall H. Breedlove*

Kendall H. Breedlove, *pro se*

2831 Gallows Road, Suite 145
Falls Church, VA 22042

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[18] The *Appellant's Notice of Appeal* was filed by postage-prepaid, certified mail (#P 252-970-184). The certified-mail envelope (#P 252-970-184) within which the *Notice of Appeal* was filed bears postmark of February 22, 1996, thirty days after the January 23, 1996, decision being appealed, and thus timely filed in accordance with Fed. R. App. P. 25 (c).

Exhibit 6 ***Unpublished February 14, 1996, Mandate of the Fourth Circuit Court of Appeals*** [19]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
February 14, 1996

No. 95-1737
CA-94-639-A

Breedlove v. Tysons Manor[20]

MANDATE

The judgment of this Court dated 1/23/96 takes effect today.

BERT M. MONTAGUE

CLERK

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[19] Exhibit 6 shows that the Fourth Circuit court issued its mandate 7 days after the denial of the *Sworn Petition for Rehearing*. The Fourth Circuit court did not act upon Petitioner's request to recall and to stay the mandate, pending review by the U.S. Supreme Court (see request contained in paragraph 3 of *Appellant's Notice of Appeal*, in Exhibit 5, *ante*), but, rather, the Clerk of the Fourth Circuit returned *Appellant's Notice of Appeal* to the Petitioner, before the Fourth Circuit court could reach and act upon the request to recall and stay the mandate. For details of the return, see Clerk's letter reproduced as Exhibit 7, *post*.

[20] Previously, on August 17, 1995, the Petitioner herein filed his *Petition for Certiorari* in the actual case, *Breedlove v. Tysons Manor Homeowners Association, et al.*, (E.D. Va., C.A. number 94-639-A, dism'd 1994; affm'd C.A.4 docket no. 94-2316, 1995; cert. denied, S.Ct. no 95-474, 1995), a civil rights' suit under 42 USC §1983, which contains a constitutional challenge to the Virginia property owners association lien law, on its face.

Exhibit 7 ***February 27, 1996, Clerk's Letter Returning the Filed Notice of Appeal***[21]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
1100 EAST MAIN STREET
BERT M. MONTAGUE U.S. COURT HOUSE ANNEX TELEPHONE
CLERK RICHMOND, VIRGINIA 23219 (804) 771-2213

February 27, 1996

Kendall H. Breedlove
2831 Gallows Road #145
Falls Church, VA 22042

Re: 95-1071, Breedlove v. Tysons Manor
CA-94-639-A

Dear Mr. Breedlove:

We have received your Appellant's Notice of Appeal.

This Court's Local Rule 40(d) states that, except for timely suggestions for rehearing in banc, cost and attorney fee matters and other matters ancillary to the filing of an application for writ of certiorari with the Supreme Court, the Office of the Clerk shall not receive motions or other papers requesting further relief in a case after the court has denied a petition for rehearing or the time for filing a petition for rehearing has expired.

This office is returning your Notice pursuant to the provisions of Local Rule 40(d).[22]

I enclose for your information a sheet outlining the procedures for applying to the Supreme Court of the United States for a writ of certiorari.

Yours truly,
BERT M. MONTAGUE, Clerk
By: /s/ *Shirley J. Beasley*
Deputy Clerk

Enclosure(s)

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[21] Exhibit 7 shows the Clerk has misinterpreted Local Rule 40(d). The Clerk has failed to recognize the *Appellant's Notice of Appeal* as being "other matters ancillary to the filing of an application for writ of certiorari," and the request to recall and stay the mandate (included within the *Notice*) as being permitted by Fed. R. App. P. 41(b).

[22] The enclosed single original of the *Appellant's Notice of Appeal*, returned by the Clerk, bears the court's date-stamped "FILED" indicia. Returned also was the certified mail (#P 252-970-184) envelope, postmarked February 22, 1996, in which Petitioner's *Notice of Appeal* had been mailed to the court.

Exhibit 8 ***Factual Background to the Instant Ex Parte Action*** [23]

Facts as to Tysons Manor Homeowners Association POA lien—

1. For purposes of collection by coercion, private individuals (Tysons Manor Homeowners Association) filed—under the Virginia property owners association (hereinafter POA) lien law—a false POA lien maliciously, against Petitioner Breedlove as lienee on a property which Petitioner no longer owned at the time that Tysons Manor Homeowners Association filed the offending POA lien. Title to the property liened by Tysons Manor HOA had been transferred by deed in the public records over a month before the POA lien was filed. This improper naming of the Petitioner as lienee violated Virginia law, in that in Virginia, a lien must be filed against the property owner of record, according to the holding of the Virginia Supreme Court in *Wallace v. Brumback*, 177 Va. 36, 12 S.E.2d 801 (1941). This offending POA lien was filed May 19, 1993, for $2,043.90, plus interest, costs, and attorney's fees, on an improved townhouse property in Fairfax County, Virginia, claiming *two years* of association dues and other charges, including unique trash removal, the association claimed against Petitioner Breedlove.[24] Tysons Manor HOA did not refile the POA lien properly against the new property owner.

2. On May 13, 1993, Tysons Manor HOA caused a personal action in debt against Petitioner Breedlove to be filed in the General District Court of Fairfax County, Virginia, by "Warrant in Debt," dated May 13, 1993, case no. C93-13539, alleging a debt against Petitioner in the amount of $2,043.90, plus interest, costs, and reasonable attorney's fees. Court records indicate bad return of service when the case was called on July 12, 1993, the return date. Tysons Manor has entered no nonsuit and no other termination of this action has been had.

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[23] Exhibit 8 sets forth the factual background in the underlying *ex relatu* cases in Virginia state courts.

[24] *Virginia Code §55-516* permits liening only for association dues which became due during the one year immediately preceding the date on which the POA lien is filed, and for special assessments for capital projects, approved by the association board and applicable to all property owners generally, which became due during the one year preceding the date of lien. To review *Virginia Code §55-516*, see copy of *Virginia Code §55-514* through *§55-516*, reproduced as Appendix Exhibit 22, *post.*

Thus, this controversy is an on-going controversy or case. Petitioner denies this debt and asserts affirmative defense of payment.

3. On May 19, 1993, Tysons Manor HOA caused to be recorded in the land records of Fairfax County, Virginia, in Deed Book 8562, at Pages 1862 – 1865, a "Memorandum of Lien," dated April 28, 1993, (hereinafter referred to as May 19th POA lien) against Petitioner Breedlove, as named lienee, and against property identified as lot #32, Tysons Manor, commonly known as 8149 Larkin Lane, Vienna, Virginia, 22182—the Fairfax County property—which lien in the amount of $2,043.90, for two years of association dues and other charges the association claimed against Petitioner Breedlove. Petitioner denies this debt and asserts affirmative defenses of payment and unconstitutionality.

4. On July 12, 1993, upon the *Tysons Manor Homeowners Association v. Kendall H. Breedlove*, (Fairfax County #C93-13539) "Warrant in Debt" action being called in General District Court, court records indicate bad return of service was made.

5. On December 12, 1993, Tysons Manor HOA caused to be recorded a satisfaction and release, dated November 18, 1993, in the land records of Fairfax County, Virginia, in Deed Book 8892, at Page 978, which released of record the May 19th lien. In order to be able to settle on a sale transaction, the April 2nd deed holder had to pay the May 19th POA lien of Tysons Manor Homeowners Association.

Facts as to Sky Bryce Association POA liens—

6. Also, for purposes of collection by coercion, private individuals (Sky Bryce Association, Inc.) filed—under the Virginia POA lien law—two POA liens maliciously, against Petitioner Breedlove as lienee on two properties in the Bryce Mountain recreational land development. These offending POA liens were filed June 28, 1994, for $926.00 and $926.00 on two partially-improved recreational properties in Shenandoah County, Virginia, owned by Petitioner Breedlove: one lot owned

solely by Petitioner Breedlove and the other lot owned by Petitioner with two other persons. These two liens are in part unlawful for being overreaching, in that each lien made claim for *seven past years* of association dues plus *one year of future* "accelerated assessments," for July, 1994, through June, 1995, *not yet due* at the time of lien filing. Both liens included claims for interest and "reimbursement of costs and additional attorney's fees."[25]

7. On May 17, 1994, Petitioner filed the instant *ex parte* action, which contains Count II based on the controversy between Sky Bryce POA and Petitioner and the stated intention of Sky Bryce POA to file two POA liens, including claims for more than only dues past due which became due during the one year immediately preceding the lien-filing date, and including capitalized interest, both unlawful for being noncompliant with *Virginia Code §55-516*, for the creation of POA liens, and being unconstitutional for failing to provide Due Process consonant with *Connecticut v. Doehr, supra.*

8. On May 28, 1994, as part of a pattern of unlawful and unconstitutional activity, the attorneys for Sky Bryce POA filed 46 POA liens against owners of Virginia property in the Bryce Mountain recreational land development. Each of these 45 POA liens is in part unlawful for not being in compliance with *Virginia Code §55-516*, for the creation of liens, in that all 45 liens make claim for more than only the dues which became due in the one year immediately prior to the lien being filed, and all 45 liens are unconstitutional for failing to provide Due Process consonant with *Connecticut v. Doehr, supra.*

9. On June 28, 1994, as a continuation of a pattern of unlawful and unconstitutional activity, Sky Bryce POA caused to be recorded in the land records of Shenandoah County, Virginia, in Deed Book 711, at Pages 274 – 275, two documents entitled "Memorandum of Lien For Property Owner Association Assessments," dated June 22, 1994, (hereinafter

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[25] *Virginia Code §55-516* permits liening only for association dues which became due during the *one year* immediately preceding the date on which the POA lien is filed, and for special assessments for capital projects, approved by the association board and applicable to all property owners generally, which became due during the *one year* preceding the date of lien.

referred to as the June 28th POA liens) against two properties owned wholly or partly by Petitioner: one lien for $926.00 against the Petitioner's wholly-owned property and one lien for $926.00 against Petitioner's partly-owned property. Both liens made claim for ***seven*** past years' dues, plus one year of ***future*** "accelerated assessments" for July, 1994, through June, 1995, *not yet due* at the time of lien filing. Both liens included claims for "reimbursement of costs and additional attorney's fees." Petitioner denies these debts and asserts affirmative defenses of statute of limitations, *laches*, and unconstitutionality.

10. Also on June 28, 1994, as a continuation of a pattern of unlawful and unconstitutional activity, Sky Bryce POA caused to be filed 51 POA liens against owners of Virginia property in the Bryce Mountain recreational land development (including the two POA liens against Petitioner). Each of these 51 POA liens is in part unlawful for not being in compliance with *Virginia Code §55-516*, for the creation of liens, in that all 51 liens make claim for more than only the dues which became due in the one year immediately prior to the lien being filed, and all 51 liens are unconstitutional for failing to provide Due Process consonant with *Connecticut v. Doehr, supra.*

11. a. On October 24, 1994, attorneys for Sky Bryce POA sent Petitioner a letter, stating Petitioner's "current indebtedness to the Association" as being $1,043.90 on Petitioner's wholly-owned property and $1,319.19 on Petitioner's partly-owned property, totaling $2,363.09, for which a certified check was sought "to satisfy this debt and avoid a judgment being entered against" Petitioner.

b. This letter informed Petitioner that suit had been entered against him and his co-owners and included a copy of the *warrant in debt* in *Sky Bryce Association, Inc. v. Kendall Harold Breedlove, et al.*, (Va., 19th Cir., Fairfax General District Court civil file no. 94-28960) dated October 24, 1994, setting a return date of January 4, 1995, in Fairfax County General District Court. Curiously, the *warrant in debt*, dated October 24, 1994, and its accompanying *affidavit* signed by Mr. Mihalik, president of the POA, made claim only for $1,422.00, on the two properties combined, plus interest, costs and attorney's fees.

12. On the return date, January 4, 1995, for the warrant in debt, the sheriff indicated bad return of service on all the defendants in *Sky Bryce Association, Inc. v. Kendall Harold Breedlove, et al.*

13. The filing of the two POA liens against Petitioner, four months prior to entering suit for an action in debt against Petitioner, demonstrates that these two June 28, 1994, POA liens were employed as ancillary process, for prejudgment attachment.

14. On July 26, 1995, plaintiff Sky Bryce Association, Inc. nonsuited, without prejudice, its action in debt, *Sky Bryce Association, Inc. v. Kendall Harold Breedlove, et al.*, (Va., 19th Cir., Fairfax General District Court civil file no. 94-28960).

15. On August 4, 1995, Sky Bryce Association, Inc., next filed two actions in debt against Petitioner: (a) *Sky Bryce Association, Inc. v. Kendall H. Breedlove,* (Va., 19th Cir., Fairfax General District Court civil file no. 95-23875), dated August 4, 1995; and (b) *Sky Bryce Association, Inc. v. Kendall H. Breedlove, et al.*, (Va., 19th Cir., Fairfax General District Court civil file no. 95-23876), dated August 4, 1995, with substituted service through the Secretary of the Commonwealth.

16. Service through the Secretary of the Commonwealth failed as to both actions. Petitioner moved the Fairfax County District Court, by special appearance, in civil file number 95-23875, to quash service as faulty and to dismiss the suit with prejudice for lack of jurisdiction, in that the Circuit Court of Shenandoah County, Virginia, had previous exclusive jurisdiction to hear and decide all matters pertaining to the POA liens and the liened property, conferred by the plaintiff Sky Bryce Association, Inc., having filed voluntarily its POA liens among the land records of that Virginia circuit court for Shenandoah County.

17. On January 31, 1996, the Honorable Leslie Alden, Fairfax County General District Judge, granted Breedlove's motions quashing service and dismissing the action in debt in

Sky Bryce Association, Inc. v. Kendall H. Breedlove (Fairfax civil file number 95-23875).

18. To date, *ex relatu* plaintiff Sky Bryce POA has not brought any action against Petitioner to enforce either of the two June 28, 1994, POA liens they placed on the Petitioner's Shenandoah County properties, (in which enforcement suit the Petitioner, as lienee property owner, would be permitted to contest the unconstitutional June 28, 1994, POA liens, which are unlawful in part for being noncompliant with *Virginia Code §55-516,* for the creation of POA liens), demonstrating that the *ex relatu* plaintiff's purpose for filing the June 28, 1994, POA liens was prejudgment attachment and collection by coercion.

As to the three liens—

19. As a result of these three POA liens on the three properties so liened, Petitioner Breedlove suffered deprivation of significant property interests and liberty interests—defamation of reputation and creditworthiness, with palpable consequences (resulting in mortgage foreclosures and abandonment of Petitioner's real estate investment business.)

20. The ***property-interest*** deprivations have continued on the two Shenandoah County recreational lots for 22 months—from June 28, 1994, until the present.

21. The ***liberty-interest*** deprivations have continued on the two Shenandoah County recreational lots for 22 months—from June 28, 1994, until the present—and will continue indefinitely into the future.

22. The ***liberty-interest*** deprivations have continued on the Fairfax County property for 36 months—from May 19, 1993, until the present—for the offending May 19th POA lien has not been removed from record, even though the lien has been released of record.

Exhibit 9 ***Detailed course of proceedings of the instant* ex parte *action before the trial court***[26]

1. The course of proceedings by the district court (the trial court) departed from customary judicial procedures to such an extent and from procedural due process to such an extent that the cumulative effect was to deny the Petitioner his federal constitutional and federal civil rights, amounting to reversible error.

2. On May 17, 1994, the Petitioner, as complainant, filed *Ex Parte BREEDLOVE*, the instant *ex parte* action, in the U.S. District Court for the Eastern District of Virginia.

a. Petitioner Breedlove (1) sought declaration under 28 USC §2201 of the constitutionality of the Virginia Property Owners Association Act, particularly its assessment statute, its lien statute, and its compliance statute, *on their face*, based upon the holding of ***Connecticut v. Doehr***, 501 U.S. 1, 115 L.Ed.2d 1, 111 S.Ct. 2105 (1991), that state laws which create and enforce liens are subject to the strictures of due process, and (2) requested the application of the *Doehr*-version of the three-part *Mathews* test set forth for use in private-party-initiated deprivations.[27]

b. The Virginia POA lien law, *on its face*, does not provide to the lienee either Due Process notice or Due Process opportunity to be heard before the lien attaches and Virginia postdeprivational remedies are inadequate on their face.

c. Additionally, in the instant *Ex Parte BREEDLOVE*, Petitioner, as complainant, sought injunctive relief under 42 USC §1983 against enforcement of such Virginia POA lien statutes as the court might declare unconstitutional.

3. Petitioner sought declaration of the constitutionality of the Virginia property owners association lien law in *ex parte* action, pursuant to the entitlement created by the U.S. Supreme

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[26] Exhibit 9 sets forth the course of proceedings before the federal district court for the Eastern District of Virginia, Alexandria Division.

[27] ***Mathews v. Eldridge***, 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976).

Court in *Ex Parte PORESKY, supra*, for a complainant to seek declaratory judgment of the constitutionality of a state statute by *ex parte* action, when the action is a justiciable action. The instant action is possessed of justiciability, in that it arises from ongoing controversy in two underlying *ex relatu* suits and lien actions. Details of the *PORESKY* holding are set forth in footnote 20 to this exhibit's paragraph 13, *post.*

4. At the initiation of the instant *Ex Parte BREEDLOVE* action, in good-faith compliance with appropriate due process and comporting with 28 USC §2403 (b), Petitioner Breedlove notified the Governor of Virginia and the Attorney General of Virginia of the initiation of the action and furnished a copy of the complaint to each of them [citing therein 28 USC §2403 (b)] by first-class, certified mail, postage prepaid, on May 17, 1994.

5. On June 1, 1994, Petitioner filed a *praecipe* concerning a typographic error in a paragraph number reference in the *Complaint* and requesting the clerk of the federal district court to make pen and ink correction of the typographic error. Petitioner served copies by first-class mail upon the Governor of Virginia and the Attorney General of Virginia (via certified mail to the Attorney General).

6. a. On June 3, 1994, Petitioner filed *Complainant's Memorandum,* which included the following assertion:

> "As the official charged with administering the laws of the Commonwealth of Virginia, the Attorney General should investigate the 51 POA liens filed by Sky Bryce Association, Inc., on May 26, 1994, in violation of *Virginia Code §55-516*, and provide an independent report to this Court."[28]

b. This memorandum included as attached exhibits three Shenandoah County court-certified, sample property owners association (POA) liens **filed by Sky Bryce Association, Inc.**, against other property owners, on May 26, 1994, each of which liens is for seven or more years' alleged association dues from past years and for one year's future assessments not yet due.[29] Petitioner served copies by first-class mail upon the Governor of Virginia and by first-class, certified mail upon the Attorney General of Virginia.

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[28] *Complainant's Memorandum in Support of Complainant's Request for Certification of Unilateral Class Action*, June 3, 1994, paragraph III. D, at page 6.

7. a. On July 5, 1994, Petitioner filed *Complainant's Supplemental Memorandum*, which included the following assertion:

> "That Tyson's Manor HOA's unlawful action in filing the May 19, 1993 POA lien in wilful, wanton disregard of Cmplainant's rights and of the rights of others, complained of in the Complaint, is not a one-time, extraordinary occurrence."[30]

b. This July 5, 1994, supplemental memorandum included as attached exhibits three Fairfax County court-certified, sample POA liens **filed by *ex relatu* plaintiff Tysons Manor Homeowners Association** previously against other property owners, on November 16, 1990, two of which liens are for three or more years' alleged association dues from past years and one of which liens is for two years' alleged association dues from past years.[31] Petitioner served copies by first-class mail upon the Governor of Virginia and by first-class, certified mail upon the Attorney General of Virginia.

8. a. On July 11, 1994, Petitioner filed *Complainant's Second Supplemental Memorandum*, which included the following assertions:

> "That Sky Bryce POA's unlawful action in filing the June 28, 1994 POA liens against Complainant, in wilful, wanton

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[29] The Virginia POA lien statute, *Virginia Code §55-516*, authorizes a POA lien only for those dues which became due during the one year immediately preceding the date on which the POA lien is filed, and not for any future dues not yet become due.

[30] *Complainant's Supplemental Memorandum in Support of Complainant's Request for Certification of Unilateral Class Action*, July 5, 1994, paragraph III. B, page 2.

[31] The Virginia POA lien statute, *Virginia Code §55-516*, authorizes a POA lien only for those dues which became due during the one year immediately preceding the date on which the POA lien is filed.

disregard of Complainant's rights and on the rights of others, complained of in the Complaint, is not a one-time, extraordinary occurrence."[32]

"As the official charged with administering the laws of the Commonwealth of Virginia, the Attorney General should investigate the 96 POA liens filed by Sky Bryce Association, Inc., on May 26, 1994, and on June 28, 1994, in violation of *Virginia Code §55-516*, and provide an independent report to this Court."[33]

b. This second supplemental memorandum included as attached exhibits seven additional Shenandoah County court-certified, sample POA liens filed **by *ex relatu* plaintiff Sky Bryce Association, Inc**., (a property owners association separate from Tysons Manor Homeowners Association) against Petitioner and against other property owners, on June 28, 1994, (a second group of liens, filed on a different date) each of which liens is for one to eight years' alleged association dues from past years and for one year's future assessments not yet due.[34] Petitioner served copies by first-class mail upon the Governor of Virginia and by first-class, certified mail upon the Attorney General of Virginia.

9. On September 15, 1994, Petitioner filed *Complainant's Motion for Written, Published, Self-contained Memorandum Opinion of the Court's Findings, Rulings, and Decision*, pointing out that since the U.S. Supreme Court decision of *Connecticut v. Doehr*,[35] that courts in Virginia have failed to publish cases in which the constitutionality of Virginia lien statutes is challenged under theories arising under *Connecticut v. Doehr*.

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[32] *Complainant's Second Supplemental Memorandum in Support of Complainant's Request for Certification of Unilateral Class Action*, July 11, 1994, paragraph III. B, page 4.

[33] *Id*., paragraph III. D, page 7.

[34] The Virginia POA lien statute, *Virginia Code §55-516*, authorizes a POA lien only for those dues which became due during the one year immediately preceding the date on which the POA lien is filed, and not for any future dues not yet become due.

[35] *Connecticut v. Doehr*, 501 U.S. 1, 115 L.Ed.2d 1, 111 S.Ct 2105 (1991).

10. On September 21, 1994, Petitioner by *praecipe*, filed his *affidavit*, dated September 16, 1994, swearing to the truth of the factual allegations contained in the *Complaint* and, thus, verifying the *Complaint* in its entirety.

11. On January 27, 1995, Petitioner filed *Complainant's Motion for Certification to Attorney General of Virginia, Pursuant to 28 USC §2403 (b), of Constitutional Challenge to Virginia Property Owners Association Act,* and noticed this motion for hearing on February 10, 1995. This motion was never heard and was not ruled upon by the trial judge. Furthermore, the trial judge had failed at the commencement of the action *sua sponte* to perform the jurisdictional duties as required by 28 USC §2403 (b), to certify the constitutional challenge to a Virginia statute and to notify the attorney general of Virginia,

12. On January 30, 1995, Petitioner filed *Complainant's Motion for the Court to Comply with the Procedures of 28 USC §2284 (b) for Determinations and Convening of Three-Judge Court*, and noticed this motion for hearing on February 17, 1995. This motion was never heard and was not ruled upon by the trial judge. Furthermore, the trial judge had failed at the commencement of the action *sua sponte* to perform the jurisdictional duties as required by 28 USC §2284 (b), to call to her assistance two other judges or to make determinations and findings that the matter is not a three-judge matter, even though pleaded as a three-judge matter and even though Petitioner had made a formal request for a three-judge court, pursuant to 28 USC §2284, in the May 17, 1994, *Complaint*.

13. a. On February 10, 1995, at the oral hearing noticed for *Complainant's Motion for Certification to Attorney General of Virginia, Pursuant to 28 USC §2403 (b), of Constitutional Challenge to Virginia Property Owners Association Act*, the trial judge dismissed the *Complaint*, on the basis that the adverse parties (the plaintiffs) in the underlying *ex relatu* lien actions and suits had not been notified. Petitioner objected and stated as authority the holding of *Ex Parte* P*ORESKY*, that Petitioner was entitled to *have ex parte* hearing on the question of

constitutionality of a state law to which he had been subjected in actual controversy.[36]

b. The trial judge claimed that the Petitioner had sued a homeowners association and had failed to serve any defendants, so that there was no lawsuit before the court. The trial judge ignored Petitioner's pleading of the holding of *Ex Parte PORESKY*, *supra*, and dismissed the Petitioner's case. (For details of the oral proceedings, some of which may be unreliable, **see** Appendix Exhibit 18, *post*, for the purported transcript of the February 10, 1995, hearing.)

c. This oral dismissal *without* prejudice by the federal district trial judge came as a surprise at a hearing on Petitioner's motion for the court to comply with a mandatory, statutory duty under 28 USC §2403 (b) to certify the constitutional challenge to Virginia, in which there is no judicial discretion and which is mandatory even if the case can be disposed of in some other way.

d. The federal district court issued its *dismissal order*, captioned as *Ex Parte Kendall H. Breedlove*, dated February 10, 1995,[37] stating:

> "For the reasons stated in open court, the complaint is DISMISSED WITH PREJUDICE. "

e. The written *order* of February 10, 1995, dismissing the action *with* prejudice, was even more of a surprise, in that the written *order* was materially at variance with the trial judge's oral ruling in the February 10, 1995, hearing. This dismissal: (a) denied Petitioner procedural due process; (b) deprived

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[36] The U.S. Supreme Court held in *Ex Parte PORESKY*, 290 U.S. 30, 78 L.Ed. 152, — S.Ct. — (1933), that Mr. Poresky was entitled to have a declaration of the constitutionality of the Massachusetts mandatory auto insurance law, even though the Governor and Attorney General, and other officials of Massachusetts were not required as parties defendant, and these officials were dismissed as defendants—for being joined improperly—prior to Mr. Poresky being granted hearing on the merits and a declaration that the questioned law was constitutional (without Massachusetts being a defendant).

[37] This February 10, 1995, dismissal order was captioned corrently as *Ex Parte KENDALL H. BREEDLOVE, ex rel. Tysons Manor Homeowners Association v. Breedlove, ex rel. Sky Bryce Association, Inc. v. Breedlove*. **See** copy of the February 10, 1995, *dismissal order* at Appendix Exhibit 10, *post*.

Petitioner of his constitutional rights of Due Process (for being made without any show-cause order) and Equal Protection under law; and (c) deprived Petitioner of his *entitlements* to the procedures of 28 USC §2403 (b) and 28 USC §2284, permanently, wrongfully, and without minimal due process—notice and an opportunity to be heard.

14. On March 1, 1995, Petitioner filed *Complainant's Motion to Vacate February 10, 1995, Order*, as a post-judgment motion, quoting therein multiple legal authorities for *ex parte* hearing for declaration of the unconstitutionality of the Virginia property owners association lien law. Petitioner quoted from *United States v. Merriwether*, the Fifth Circuit court of appeals' holding that participation in the instant *ex parte* action by the adverse parties in the underlying *ex relatu* suits would prejudice Petitioner's appeal then pending before the Fourth Circuit court of appeals, in suit against some of those adverse parties, by exposing Petitioner's legal theories to the scrutiny of those adverse parties.[38] Petitioner noticed this motion for hearing on March 10, 1995. (For details of the oral proceeding, some of which may be unreliable, **see** Appendix Exhibit 19, *post*, for the purported transcript of the March 10, 1995, hearing.)

Disposition of case by District Court—

15. The outcome of the lower, federal district court's judgment in hearing of February 10, 1995, is that the instant *ex parte* action was dismissed in its entirety for failure to serve any "defendants" in the instant *ex parte* action. The federal district judge's reference to nebulous, so-called "defendants," whom the judge alleged (without ruling) should have been summoned, appearently referred to the plaintiffs in the underlying *ex relatu* suits, even when those plaintiffs were not named, or declared, or judicially-joined defendants in the instant *ex parte* action) and when neither the State of Virginia nor its officials were named, or declared, or joined defendants, and after Virginia had been notified by Petitioner, pursuant to 28 USC §2403 (b), of the commencement of the action.

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[38] *United States v. Merriwether*, 486 F.2d 498, at 505-506 (C.A. 5th Cir., 1973)

16. The motion for which Petitioner noticed the February 10, 1995, hearing—the January 27, 1995, motion for the court to comply with 28 USC §2403 (b), to certify the constitutional challenge, and to notify the Attorney General of Virginia—went unheard and unruled upon.

17. The federal district court failed prior to the dismissal to make the determinations required by 28 USC §2284, when a three-judge court is requested (as Petitioner requested in the May 17, 1994, *Complaint*, in Count II, paragraph 4a, at page 16), and lacking these findings and determinations, a single judge lacked jurisdiction to dismiss the action for *any* reason, except upon the direction of the three-judge court.

18. The lower, federal district court failed to rule upon or to enter dispositive order for: (a) *Complainant's Motion for Certification to Attorney General of Virginia, Pursuant to 28 USC §2403 (b), of Constitutional Challenge to Virginia Property Owners Association Act*, dated January 27, 1995; (b) *Complainant's Motion for the Court to Comply with the Procedures of 28 USC §2284 (b) for Determinations and Convening of Three-judge Court*, dated January 30, 1995; and (c) *Complainant's Motion For Written, Published, Self-Contained Memorandum Opinion of the Court's Findings, Rulings, and Decision*, dated September 15, 1994; prior to dismissing the instant *ex parte* action, and by failing to do so, denied procedural due process to Petitioner.

Exhibit 10 ***Copy of February 10, 1995, Dismissal Order by Federal District Court, now being appealed***[39]

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Ex Parte Kendall H. Breedlove,)
Complainant)
)
ex rel.)
Tysons Manor Homeowners Assoc.)
Plaintiff,)
) Civil Action
v.) No. 94-639-A
Kendall H. Breedlove,)
Defendant)
)
ex rel.)
Sky Bryce Association, Inc.)
Plaintiff,)
)
v.)
Kendall H. Breedlove,)
Defendant)

ORDER

For the reasons stated in open court, the complaint is DISMISSED WITH PREJUDICE.

The Clerk is directed to forward copies of this Order to counsel of record.

Entered this 10th day of February, 1995.

(signed) Leonie M. Brinkema
Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

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[39] Exhibit 10 shows that the ***dismissal order*** was entered by the trial judge captioned correctly, as an ***ex parte*** action rather than as a ***bi partes*** suit. The caption of the January 23, 1996, ***opinion*** (Exhibit 2) and the February 7, 1996, ***order*** (Exhibit 4) are materially at variance with this ***dismissal order***.

Exhibit 11 Copy of March 10, 1995, Order Denying Vacation of February 10, 1995, Dismissal Order, now being appealed[40]

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

KENDALL H. BREEDLOVE,)
)
Plaintiff)
)
)
v.) Civil Action
) No. 94-639-A
TYSONS MANOR HOMEOWNERS, et al.,)
)
Defendants.)

ORDER

For the reasons stated in open court, Plaintiff's Motion to Vacate Order is DENIED.

The Clerk is directed to forward copies of this Order to counsel of record.

Entered this 10th day of March, 1995.

(signed) Leonie M. Brinkema
Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

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[40] Exhibit 11 shows the administrative change to the wrongful *bi partes* caption—"***Breedlove v. Tysons Manor Homeowners, et al.***" —from the *ex parte* caption of the ***dismissal order***, entered a month previously, as shown in Exhibit 10, facing, without any judicial joining of Tysons Manor Homeowners Association, *et al.*, as defendants, pursuant to Fed. R. Civ. P. 19.

Exhibit 12 ***Details of District Court's Jurisdiction*** [41]

1. The federal district court dismissed the instant action during the stage of establishing the trial court's jurisdiction, nine months after Petitioner filed the May 17, 1994, *Complaint.*

2. The federal district court possessed *in personam* jurisdiction as to the Petitioner, as *ex parte* complainant, and as to the Commonwealth of Virginia.

3. Having acquired jurisdiction in the instant action, the trial court improperly renounced its jurisdiction in the instant action, nine months later, (a) without rendering the assistance due a *pro se* litigant to bring any necessary defendants before the court, in accordance with the holding of the Fourth Circuit court in *Gordon v. Leeke, supra*; (b) without complying with the jurisdictional requirements of 28 USC §2284 and 28 USC §2403 (b); and (3) without hearing the merits of the federal constitutional questions in the May 17, 1994, *Complaint.*

4. The *in personam* jurisdiction of the trial court to procede to judgment as to the declaratory relief on the constitutional challenge to the Virginia property owners association lien law and as to the injunctive relief on any declaration of unconstitutionality is comprised as follows:

A. Subject-matter jurisdictional element

1. The trial court below, the federal district court, had subject-matter jurisdiction by reason of 28 USC § 1331, in that this is a civil action for declaratory relief arising under the Constitution of the United States; and by reason of 28 USC§ 1343 a (3), in that this is a civil action claiming injunctive relief under 42 USC §1983.

2. The trial court had power to render the declaratory relief sought, in accordance with the following holding by the Ninth Circuit Court of Appeals:

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[41] Exhibit 12 shows that the trial court possessed necessary *in personam* jurisdiction to procede to judgment.

> "Given jurisdiction under 28 USC §1331, federal district court had power, under 28 USC §2201, to render declaratory relief." [*Kimball v. Callahan*, 493 F.2d 564 (C.A.9, Or., 1974) cert den 419 U.S. 1019, 42 L.Ed.2d 292, 95 S.Ct 491 (1974).]

B. Territorial jurisdictional element

1. The federal district court had territorial jurisdiction, based upon the *ex relatu* plaintiffs in the underlying *ex relatu* cases having performed their actions in Fairfax County, Virginia, and Shenandoah County, Virginia. Allegations establishing the territorial jurisdiction of the court are set forth in Count I, paragraphs 8 through 15, at pages 3-4, and Count II, paragraphs 11-12, at page 18, of the May 17, 1994, *Complaint* in the instant action.

C. Notice jurisdictional element

1. The federal district court had notice jurisdiction over the Petitioner and over the Commonwealth of Virginia, based upon the following:

a. As to Petitioner—

(1) The Petitioner made voluntary general appearance in the federal district court by filing his *Complaint* and subsequent motions in the instant action and by making courtroom appearance to argue the matters.

b. As to Commonwealth of Virginia—

(1) *Notice*— The Petitioner notified the Governor of Virginia and the Attorney General of Virginia of the filing of the *Complaint* in the instant action, comporting with 28 USC §2403 (b), and comporting with due process, as demonstrated by paragraph 4 b of Count II of the May 17, 1994, *Complaint*, quoted below:

> (a) " b. Complainant certifies that he has served a copy of this Complaint both upon the Governor and upon the Attorney General of the Commonwealth of Virginia, by certified mail, postage prepaid, in accordance with 28

USC §2284, as of the date of filing this action." [*Complaint*, dated May 17, 1994, Count II, paragraph 4 b, page 16.]

c. As to the plaintiffs in the underlying *ex relatu* suits—

1. The *ex relatu* plaintiffs in the underlying *ex relatu* suits are adverse parties and, as such, are not properly part of the instant *ex parte* action. The federal district court does not require notice jurisdiction over these parties to grant the declaratory relief prayed for in the instant action. The *ex relatu* plaintiffs in the underlying *ex relatu* suits are *not* named defendants, nor declared defendants, nor judicially-joined defendants in the instant *ex parte* action.

2. The trial judge did not determine by *order* that the Petitioner had failed to name the *ex relatu* plaintiffs in the underlying *ex relatu* suits as defendants or interested parties in the *Complaint*. Furthermore, if the trial judge was of the opinion that any of these *ex relatu* plaintiffs in the underlying *ex relatu* suits was a necessary defendant, the trial judge could have ordered, *sua sponte*, under Fed. R. Civ. P. 19, any of these *ex relatu* plaintiffs in the underlying *ex relatu* suits to be joined as parties defendant in the instant *ex parte* action. The trial judge did not do this.

3. The trial judge had a duty to assist the Petitioner, as a *pro se* litigant, to bring any necessary defendants before the court, in accordance with the admonition of the Fourth Circuit court to its subordinate courts in *Gordon v. Leeke, supra*.

4. The omission of ruling by the trial judge—that the Petitioner failed to name any of these *ex relatu* plaintiffs in the underlying *ex relatu* suits as defendants in the instant *ex parte* action—coupled with the failure by the trial judge to assist the Petitioner, as *pro se* litigant, to bring any necessary defendants before the court (if any there be), implies that these *ex relatu* plaintiffs in the underlying *ex relatu* suits are ***not*** necessary defendants.

D. Other conditions of fact precedent to District Court's authority to act

1. The other conditions of fact precedent to the authority of the District Court to act were satisfied, as demonstrated below.

a. Standing—

(1) As set forth in the *Complaint*, Count I, Petitioner has standing to bring this complaint, in that:

> "7. a. Complainant Breedlove has standing to bring this action because:
>
> "(1) Complainant is the person against whom Tysons Manor HOA filed the false, unlawful lien, as an ancillary process, subsequent to the filing of a judicial process of a "Warrant in Debt;"
>
> "(2) Complainant is the person against against whom Tysons Manor HOA entered suit for an action in debt; and
>
> "(3) Complainant is the person who suffered damage as a proximate result of acts of persons acting under color of state process—*Virginia Code §55-514* through *§55-516*—to deprive Complainant of rights guaranteed under the United States Constitution (actions proscribed under 42 USC §1983), and through failures of the *Virginia Code §55-514* through *§55-516* to provide adequate due process protections.
>
> "b. The Complainant's standing is consistent with the relief sought, ..." [*Complaint*, Count I, paragraphs 7 a – 7 b, pages 2-3.]

(2) As set forth in the *Complaint*, Count II, Petitioner has standing to bring this complaint, in that:

> "8.a. Complainant Breedlove has standing to bring this action because:
>
> "(1) Complainant is the person against whom Sky Bryce POA threatens to file the two false, unlawful liens;

"(2) Complainant is the property owner of record as to both properties threatened to be liened;

"(3) Complainant is the person who will suffer damage as a proximate result of acts, conduct, and omissions of persons acting under color of state process—*Virginia Code §55-514* through *§55-516*—to deprive Complainant of rights guaranteed under the United States Constitution (and protected under 42 USC §1983), and through failures of the *Virginia Code* to provide adequate due process protections."

"9. The Complainant's standing is consistent with the relief sought, ..." [*Complaint*, Count II, paragraphs 8 a – 9, pages 16-17.]

b. Justiciability

(1) The instant *Complaint* has justiciability, as set forth in the *Complaint*, in Count I at paragraph 4, in that:

" 4. a. This complaint meets the test of justiciability associated with 28 USC §2201, as to whether there is a claim of specific present objective harm or threat of specific future harm, as set forth in *Wagner v. Simon*, 412 F. Supp. 426 (W.D. Mo., 1974), affm'd 534 F.2d 833 (C.A. 8, Mo., 1976). "

" b. In this complaint, there is claim of specific present objective harm, which is continuing, in that the damage to the Complainant's good name and reputation continues caused by the Tysons Manor HOA May 19th lien, by the appearance in the public records that Complainant owed a large debt, had to be liened for that alleged debt, and succumbed to paying that lien, thereby damaging Complainant's good name, reputation, and creditworthiness, to which he is *entitled* as part of his liberty interest."

" c. In this complaint, there is claim of threat of specific future harm, in that, as the two counts demonstrate, the problems complained of are not limited to single, unique, extraordinary occurrence. Complainant is threatened with two similarly-unlawful POA liens by Sky Bryce Association, Inc. (complained of in Count II of the instant action), which liens are not in compliance with *Virginia Code §55-516* for the creation of liens, and lacking the same due-process protections." [*Complaint*, Count I, paragraphs 4 a – 4 c, page 2.]

c. Actual controversy—

(1) This is an on-going controversy or case. Petitioner has alleged his standing to bring this *ex parte* action based, in part, upon the existence of actual controversy over pertinent matters between Petitioner and the *ex relatu* plaintiffs in the two underlying *ex relatu* lien actions and underlying *ex relatu* suits, which controversy is presently on-going.

(2) It has been held that the court may not decline to entertain justiciable, actual controversies, as quoted below:

> "Discretion to decline jurisdiction for declaratory judgment exists, but such discretion cannot be exercised against entertainment of controversies that are justiciable and actual." [*Frazier v. Ward*, 426 F.Supp 1354 (N.D., N.Y., 1977).]

(3) The trial court did not decline jurisdiction promptly at the inception of the instant action, as the district courts are required to do, if there be no facts to support the district court's jurisdiction.

(4) Instead, the trial court exercised *in personam* jurisdiction over the Petitioner, as complainant in the instant action.\, on two occasions, by ruling on Petitioner's *motions* and entering *orders* affecting the Petitioner, after Petitioner had entered general appearance before the trial court voluntarily. Thus, the actual *in personam* jurisdiction of the trial court over etitioner, as *ex parte* complainant, is established.

(5) The federal district court dismissed the instant *ex parte* action for Petitioner's failure to serve any defendants. The dismissal *order* was entered February 10, 1995, and constituted

the final judgment by the federal district court on this matter. Petitioner filed his *Notice of Appeal* on March 10, 1995, within 30 days after the district court's judgment.

d. Statute of Limitations—

The instant *ex parte* action was filed May 17, 1994, within one year of the date of the underlying *ex relatu* actions complained of and, thus, within the one year statute of limitations applicable to legal actions for personal damages in Virginia.

Exhibit 13 ***Details of Court of Appeals' Jurisdiction*** [42]

1. The Fourth Circuit court of appeals dismissed the instant action in the stage of establishing the appelate court's jurisdiction, five and two-third months after Petitioner filed the July 29, 1995, *Brief for the Appellant.*

2. The Fourth Circuit court possessed *in personam* jurisdiction as to the Petitioner, as *ex parte* complainant; as to the Commonwealth of Virginia; and as to each of the *ex relatu* plaintiffs, as appellees, for *de novo* hearing of the instant action.

3. Having acquired jurisdiction in the instant action, the Fourth Circuit court improperly renounced its jurisdiction in the instant action, five and two-thirds months later, (a) without complying *sua sponte* with the jurisdictional requirements of 28 USC §2403 (b); and (2) without hearing the merits *de novo* of the federal constitutional questions in the July 29, 1995, *Brief for the Appellant.*

4. The *in personam* jurisdiction of the Fourth Circuit court to procede to judgment in *de novo* hearing as to the declaratory relief on the constitutional challenge to the Virginia property owners association lien law and as to the injunctive relief on any declaration of unconstitutionality is comprised as follows:

A. Subject-matter jurisdictional element

1. The U. S. Court of Appeals for the Fourth Circuit has subject-matter jurisdiction, in that this is an appeal permitted by law as of right in a civil case from a district court to a court of appeals, pursuant to Fed. R. App. P. 3 (a). The jurisdiction of this federal appeals court is invoked pursuant to Title 28, United States Code, Section 1291, in that this is an appeal from a final decision of a district court of the United States—the District Court for the Eastern District of Virginia—in its *order* entered February 10, 1995, dismissing the entire action. The Petitioner's *notice of appeal* was filed timely, on March 10, 1995,

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[42] Exhibit 13 shows that the Fourth Circuit court of appeals possessed necessary *in personam* jurisdiction to procede to judgment in *de novo* hearing.

within 30 days after entry of the federal district court's final judgment.

B. Territorial jurisdictional element

1. The U. S. Court of Appeals for the Fourth Circuit has territorial jurisdiction, based upon the fact that the instant appeal is from the Eastern District of Virginia, Alexandria Division, which lies within the geographic jurisdiction of the Fourth Circuit.

C. Notice jurisdictional element

1. The U. S. Court of Appeals for the Fourth Circuit has notice jurisdiction over the Petitioner, over the Commonwealth of Virginia, and over the *ex relatu* plaintiffs in the underlying *ex relatu* suits, based upon the following:

a. As to Petitioner—

(1) The Petitioner made voluntary general appearance in the federal court of appeals for the Fourth Circuit by filing his *Notice of Appeal*, his *Brief for the Appellant*, and other motions in the instant *ex parte* action.

b. As to Commonwealth of Virginia—

(1) *Notice*— The Petitioner notified the Attorney General of Virginia of the filing of this *Appeal* in the instant action, in accordance with 28 USC §2403 (b):

(i) as demonstrated by the certification in the *notice of appeal*, quoted in part below:

> "The undersigned certifies that he caused one copy of the foregoing Notice of Appeal to be sent as notice by first-class mail, postage prepaid, to the Governor and the Attorney General of Virginia, addressed to them at the following addresses: * * * on this 10th of March, 1995."

(ii) as demonstrated by the Certificate of Service in the *Brief for the Appellant.*[43]

(2) *Certification and notice under 28 USC §2403 (b)–*

(i) The Fourth Circuit court of appeals had a clear, mandatory, statutory duty under 28 USC §2403 (b), to certify the constitutional challenge to one of Virginia's statutes, contained in the instant appeal, and to notify the Governor and the Attorney General of Virginia, pursuant to 28 USC §2403 (b). This duty is not subject to any judicial discretion.[44]

(ii) Even though the Fourth Circuit court failed to perform its duties pursuant to 28 USC §2403 (b), and even though the Clerk of the Fourth Circuit failed to perform his duty pursuant to Fed. R. App. P. 44, the Fourth Circuit court still had notice jurisdiction as to the Commonwealth of Virginia by virtue of Petitioner's July 29, 1995, notice to the Attorney General of Virginia, which comports with 28 USC §2403 (b) and comports with constitutional Due Process.

c. As to the plaintiffs in underlying *ex relatu* suits—

(1) The *ex relatu* plaintiffs in the underlying *ex relatu* suits are adverse parties and, as such, are not properly part of the instant *ex parte* action. The federal appeals court does not require notice jurisdiction over these parties to grant the declaratory relief prayed for in the instant action. The *ex relatu* plaintiffs in the underlying *ex relatu* suits are not named defendants, nor declared defendants, nor judicially-joined defendants in the instant *ex parte* action.

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[43] The Certificate of Service in the *Brief for the Appellant* cited, pursuant to Fed. R. App. P. 44, that 28 USC §2403 (b) may be applicable and set forth that two copies of the *Brief for the Appellant* had been mailed on July 29, 1995, to the Attorney General of Virginia, via postage-prepaid certified mail, as notice.

[44] a. "Under 28 USCS §2403, it is required that a district court, even though it finds that a constitutional question is frivolous, give notice to the Attorney General, leaving to him the decision whether to intervene." [*Wallach v. Lieberman*, 366 F.2d 254, 10 FR Serv 2d 747, 2 ALR Fed 969 (C.A.2, N.Y., 1966), cited in 28 USCS §2403, note 7, "Discretion," at 454.]

b. "Certification under 28 USCS §2403(b) is duty of court that should not be ignored, even if claim is obviously frivolous or may be disposed of on other grounds." [*Merrill v. Addison*, 763 F. 2d 80 (C.A.2, N.Y., 1985), 28 USCS §2403, note 7, "Discretion," at 454.]

(2) The trial judge did not determine by *order* that the Petitioner had failed to name the *ex relatu* plaintiffs in the underlying *ex relatu* suits as defendants or interested parties in the *Complaint*. Furthermore, if the trial judge was of the opinion that any of these *ex relatu* plaintiffs in the underlying *ex relatu* suits was a necessary defendant, the trial judge could ordered *sua sponte*, under Fed. R. Civ. P. 19, any of the *ex relatu* plaintiffs in the underlying *ex relatu* suits to be joined as parties defendant in the instant *ex parte* action. The trial judge did not do this.

(3) The omission of ruling by the trial judge—that the Petitioner failed to name any of the *ex relatu* plaintiffs in the underlying *ex relatu* suits as defendants in the instant *ex parte* action—implies that the *ex relatu* plaintiffs in the underlying *ex relatu* suits are ***not*** necessary defendants.

(4) All of the above aside, and while Petitioner objected that the *ex relatu* plaintiffs in the underlying *ex relatu* suits were not proper participants in the instant *ex parte* action, Petitioner, as appellant, served the requisite two copies of this *Brief for the Appellant* upon each of the counsels of record representing the *ex relatu* plaintiffs in the underlying *ex relatu* suits and liens.[45]

(5) Petitioner, as appellant, had complied with Fed. R. App. P. 25 as to proof of service of the *Brief for the Appellant* on all other parties.[46]

D. Other conditions of fact precedent to Court of Appeals' authority to act

1. The other conditions of fact precedent to the authority of the federal court of appeals for the Fourth Circuit to act are satisfied, as demonstrated below.

a. Standing—

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[45] The Certificate of Service, in the *Brief for the Appellant*, set forth that, pursuant to Fed. R. App. P. 25 (b) and 31 (b), the Petitioner mailed two copies of the *Brief for the Appellant* on July 29, 1995, to each of the counsels of record representing the *ex relatu* plaintiffs in the underlying *ex relatu* suits.

[46] The Certificate of Service was bound into the *Brief for the Appellant*, in accordance with Fed. R. App. P. 25 (d), immediately following the main section of the *Brief for the Appellant*.

(1) As set forth in the *Complaint*, Count I, paragraphs 7a - 7b, and Count II, paragraphs 8a - 9, Petitioner has standing to bring this complaint and this appeal, as discussed in Appendix Exhibit 12, paragraph D 1 a (1) and a (2), *ante*.

b. Justiciability—

(1) The instant *Complaint* has justiciability, as set forth in the *Complaint*, in Count I at paragraph 4, as discussed in Appendix Exhibit 12, paragraph D 1 b (1), *ante*.

(2) The instant *Appeal* to the Fourth Circuit possessed justiciability, in that:

(a) In this appeal, there is claim of specific present objective harm, which is continuing to the Petitioner, in that:

(i) The two June 28, 1994, POA liens by Sky Bryce Association, Inc., remain of record, and continue to hold the two Shenandoah County properties. The damaging effects of these liens upon Petitioner's good name and creditworthiness (and thus upon his liberty interest) will persist for as long as these liens are of record, even if released of record or if extinguished by action of law. Only when these liens are removed from record by judicial proceeding will their damage begin to be healed.

(ii) There is no remedy at law in *Virginia Code §508 through §55-516.1* (the Property Owners Association Act) either for a validity hearing to remove an invalid POA lien from record, or to redress the money damages attributable to the deprivation of the lienee/property owner's property interest or to the deprivation of the lienee/property owner's liberty interest (through damage to reputation and creditworthiness) by false property owners association liens which are in part unlawful.

(b) As set forth in the underlying *Complaint*, there is claim of threat of specific future harm to the Petitioner and to the members of the class prospectively imperiled, in that, as the two counts demonstrate, the problems complained of are not limited to unique, extraordinary occurrence. As set forth in the *Complaint*, members of the class continue to be threatened by false, or erroneous, or malicious, libelous, and unconstitutional property owners association liens.

c. Actual controversy—

(1) Petitioner, as appellant, had alleged his standing to bring this *ex parte* action based, in part, upon the existence of actual controversy over pertinent matters between Petitioner and the *ex relatu* plaintiffs in the two underlying *ex relatu* lien actions and underlying *ex relatu* suits, which actual controversy is presently on-going.

d. Final judgment being appealed—

(1) In the February 10, 1995, hearing, by *order* entered February 10, 1995, the trial judge dismissed the entire action, with prejudice. The February 10, 1995, *order* is an order memorializing the final judgment of the trial court.

(2) The federal courts of appeal of other circuits have held similar orders of dismissal to be appealable final orders.[47]

(3) Thus, the February 10, 1995, *order* being appealed in the instant action under 28 USC §1291, is a *final order* of the federal district court.

e. Timeliness of filing appeal—

(1) On March 10, 1995, Petitioner, as appellant, filed his *notice of appeal* with the federal district court, pursuant to Fed. R. App. P. 3 (a); within 30 days of the District Court's February 10, 1995, final judgment, in accordance with Fed. R. App. P. 4 (a); paid the applicable fees to the clerk of the district court, in accordance with Fed. R. App. P. 3 (e); and served copies of the *notice of appeal*, in accordance with Fed. R. App. P. 3 (d).

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[47] (a) "Order of dismissal was final judgment from which appeal would lie." [*Hicks v. Bekins Moving & Storage Co.*, 115 F.2d 406 (C.A.9, Wash., 1940); *Payne v. Koehler*, 225 F.2d 103 (C.A.8, Mo., 1955).]

(b) "Order dismissing action without prejudice is appealable as final order." [*Davis Forestry Corp. v. Smith*, 707 F.2d 1325 (C.A.11, Ala., 1983); reh den 714 F.2d 159 (C.A. 11, Ala.).]

(2) On March 17, 1995, Petitioner, as appellant, filed his *transcript order* with the district court, within 10 days of the *notice of appeal.*

(3) On March 23, 1995, Petitioner, as appellant, filed his *docketing statement*, via express mail (next-day delivery), postage prepaid, return-receipt requested and received, with the U. S. Court of Appeals for the Fourth Circuit, within 14 days of the *notice of appeal*. March 24, 1995, fell on a Saturday, when the office of the clerk is normally closed.

Exhibit 14 ***Nature of the Case, for Counts I and II, Quoted from the May 17, 1994, Complaint*** [48]

1. The nature of the two counts, as set forth in the May 17, 1994, *Complaint*, is quoted below:

a. [Count I] "16. This cause of action is a challenge, under the *Declaratory Judgment Act*, 28 USC §2201, as to whether the May 19th lien by Tysons Manor HOA, created under Virginia Property Owners' Association Act, ***Virginia Code § 55-508*** through ***§ 55-516***, particularly ***§ 55-514*** through ***§ 55-516***, violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Article I, § 11, of the Virginia Constitution, as applied to the instant underlying action of this Count I." [*Complaint*, at page 4.]

b. [Count II] "13. This cause of action is a challenge, under the *Declaratory Judgment Act*, 28 USC §2201, as to whether the Virginia Property Owners' Association Act, ***Virginia Code § 55-508*** through ***§ 55-516***, particularly ***§ 55-514*** through ***§ 55-516***, on its face violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Article I, § 11, of the Virginia Constitution, and should be enjoined from enforcement henceforth." [*Complaint*, at page 18.]

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[48] Exhibit 14 shows the nature of the May 17, 1994, *Complaint* as a constitutional challenge, for which the federal courts failed to comply *sua sponte* with the jurisdictional requirements of 28 USC §2403 (b), to certify the constitutional challenge and to notify the Attorney General of Virginia. And, having failed to comply with 28 USC §2403 (b), each federal court—the trial court and the appellate court—lacked jurisdiction to dismiss the instant action.

Exhibit 15 ***Relief Sought, for Counts I and II, Quoted from the May 17, 1994, Complaint***[49]

1. The nature of the relief sought in the two counts, as set forth in the May 17, 1994, *Complaint*, is quoted below:

a. [Count I prayer] "WHEREFORE, Complainant prays this Court (1) to hold that the May 19th POA lien, created under Virginia Code §55-514 through §55-516, by its application herein, is violative of the Due Process and Equal Protection Clauses of the the Fourteenth Amendment of the United States Constitution and Article I, § 11, of the Virginia Constitution, as applied in the instant underlying Count I action; and (2) to hold that the instant May 19th, 1993, "Memorandum of Lien," is and was invalid and that such order be spread of record in the land records of Fairfax County, Virginia, that the lien be removed from record by order of this Court; Complainant prays leave to amend his pleading if there be any deficiencies herein; together with such other and further relief as may seem proper to the Court." [*Complaint*, at page 15.]

b. [Count II prayer] "WHEREFORE, Complainant prays this Court (1) to hold that the Virginia Property Owners' Association Act, Virginia Code (1950), as amended, § 55-508 through § 55-516.1, and particularly statutes §55-514 through §55-516, as those statutes are being applied in the instant action, is violative of the Due Process and Equal Protection Clauses of the the Fourteenth Amendment of the United States Constitution and Article I, § 11, of the Virginia Constitution; (2) to hold that the Virginia Property Owners' Association Act, Virginia Code (1950), as amended, § 55-508 through § 55-516.1, and particularly statutes §55-514 through §55-516, on its face, is violative of the Due Process and Equal Protection Clauses of the the Fourteenth Amendment of the United States Constitution and Article I, § 11, of the Virginia Constitution; and (3) to enjoin the prospective enforcement of the Virginia Property Owners' Association Act, Virginia Code (1950), as amended, § 55-508 through § 55-516.1, and particularly statutes §55-514 through §55-516, on its face, as violative of the Due Process and Equal Protection Clauses of the the Fourteenth Amendment of the United States Constitution and Article I, § 11, of the Virginia Constitution; Complainant prays leave to amend his pleading if there be any deficiencies herein; together with such other and further relief as may seem proper to the Court." [*Complaint*, at page 23.]

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[49] Exhibit 15 shows that no relief was sought against any *ex relatu* plaintiff, as defendants in the instant *ex parte* action.

Exhibit 16 Application of updated Doehr-version of the three-part Mathews Test to the Virginia property owners association lien law to demonstrate unconstitutionality[50]

A declaration of unconstitutionality should be granted because the Virginia property owners association (hereinafter POA) lien law (*Virginia Code §55-514-* through *§55-516*) complained of fails to satisfy the *Doehr*-version, three-part *Mathews* test, set forth in *Connecticut v. Doehr*, 501 U.S. 1, 115 L.Ed.2d at 13.

1. In light of the tests of sufficiency of Due Process protection set forth in *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 23 L.Ed.2d 349, 89 S.Ct. 1820 (1969), *Fuentes v. Shevin*, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1972), *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 40 L.Ed.2d 406, 94 S.Ct. 1895 (1974), *North Georgia Finishing v. Di-Chem, Inc.*, 419 U.S. 601, 42 L.Ed.2d 751, 95 S.Ct. 719 (1975), *Mathews v. Eldridge*, 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976) and, most recently, *Connecticut v. Doehr, supra*, (1991), as to the circumstances when Due Process is required, and of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 825, 94 L.Ed. 865, 70 S.Ct. 652 (1950), and its progeny, as to the minimum Due Process required:

a. According to these citations, the Virginia Property Owner Association lien statutes, *on their face*, are repugnant to the Due Process Clause of the Fourteenth Amendment of the United States Constitution and of Article I, § 11, of the Virginia Constitution.

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[50] Exhibit 16 shows the Virginia property owners association lien law is unconstitutional, by application of the three-part *Mathews* test, as updated by *Connecticut v. Doehr, supra,* for private-party-initiated deprivations.

b. Furthermore, the unconstitutional Virginia POA lien law (*Virginia Code §55-514* through *§55-516*) fails to provide a rough parity of procedural burden on the lienor as on the lienee. For the procedural burden of $13.00 filing fee, and $1.00 notary fee, plus about one-half hour of time, a POA lienor can create a POA lien which the lienee cannot undo or dissolve by any cost or any effort. In a private dispute allegedly between debtor and creditor, such lopsided procedural favoritism by the State of Virginia of the lienor creditor over the rights of the lienee debtor, permitting prejudgment attachment without due process, is itself unconstitutional.

c. Further, the Constitution of Virginia, Article I, § 11, affords the Petitioner another protectable interest—his *entitlement* to Equal Protection under law. The *ex relatu* plaintiffs' filing of the unconstitutional, unlawful (not in compliance with *Virginia Code §55-516* for the creation of liens) May 19, 1993 POA lien and the unconstitutional, unlawful (not in compliance with *Virginia Code §55-516* for the creation of liens) June 28, 1994, POA liens deprived the Petitioner of this significant interest or *entitlement*—his *entitlement* to equal protection under law—by the filing of liens invoking, but not in compliance with, the unconstitutional *Virginia Code §55-516*, thus depriving Petitioner of his equal protection under law.

4. a. In *Mathews v. Eldridge, supra*, cited with approval in *Doehr, supra*, the United States Supreme Court set forth a three-part judicial test for adequacy of due process protection, in instances of *government-initiated* deprivation of protected rights.[51]

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[51] "More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors; first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or subsititute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*Mathews v. Eldridge, id.*, at 33, id., at 334-335.]

b. In *Connecticut v. Doehr, supra*, the *Mathews* test was updated to accommodate instances of private-party-initiated deprivation of protected rights.[52]

c. As measured against the updated, *Doehr*-version three-part *Mathews* test, **the Virginia property owners association lien law, on its face, and as applied in the instant POA liens complained of in the instant May 17, 1994, *Complaint*, fails to satisfy the necessary specific dictates of due process**, in light of the holdings set forth in paragraph 1, above, and as made applicable to liens by the holding of *Connecticut v. Doehr, supra.*

5. Applying the updated, *Doehr*-version of the three-part *Mathews* test yields the following:

As to the Doehr-version of the first Mathews factor—

> **"...first, consideration of the private interest that will be affected by the prejudgment measure..."** [*Connecticut v. Doehr, id.*, at 13.]

As to the May 19, 1993, POA lien—

6. a. Two constitutionally-protected private interests of persons affected by the May 19, 1993, POA lien are involved: (1) a property interest and (2) a liberty interest. Underlying *ex relatu* plaintiff Tysons Manor Homeowners Association filed the May 19, 1993, POA lien against Petitioner without Due Process notice and without predeprivation hearing, thus without Due Process to the lienee (the Petitioner) and to the property owner, and deprived the lienee (the Petitioner) and the property owner of two significant constitutionally-protected interests: (1) as a lien, by invading the property owner's property interest, and (2)

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[52] "For this type of case, therefore, the relevant inquiry requires, as in Mathews, first, consideration of the private interest that will be affected by the prejudgment measure; second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third, in contrast to Mathews, principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or foregoing the added burden of providing greater protections." [*Connecticut v. Doehr, id.*, at 13.]

as an overreaching, libelous lien, employed as ancillary process, by invading the lienee's (the Petitioner's) liberty interest.

b. The false May 19, 1993 POA lien was filed against Petitioner as named lienee, although Petitioner was no longer the property owner of record, and deprived the Petitioner, as *lienee*, of a significant, constitutionally-protected interest: by a libelous POA lien invading Petitioner's liberty interest.

c. Petitioner asserts that a Virginia property owners association lien is libelous if it is a false lien, for being overreaching and in part noncompliant with the statute for the creation of such liens (*Virginia Code §55-516*) and, as a consequence of such noncompliance with the Virginia property owners association lien law, wrongfully and maliciously exposes the POA lienee to scorn in the public records and places the lienee's creditworthiness at risk by filing such wrongful lien in the public records. An overreaching POA lien is libelous when it is employed as ancillary process, for prejudgment attachment, rather than as judicial process to confer the *in rem* jurisdiction of the court.

(1) The liberty interest which was invaded is *significant*: the liens libeled Petitioner's good name, reputation, and creditworthiness to which he is entitled under both the federal and state constitutions.

(2) The invasion of Petitioner's liberty interest was coupled with the Petitioner being deprived of freedom of occupation, in that when the false, libelous, malicious, unconstitutional May 19, 1993 POA lien disparaged Petitioner's good name, reputation, and creditworthiness in the public land records.

(3) The May 19, 1993, POA lien stigmatized Petitioner in his trade, business and profession of purchasing, owning, operating, and selling rental and other real estate investment properties which business depends on the extension of large amounts of credit to Petitioner.

(4) The damage done to Petitioner's creditworthiness caused Petitioner to abandon his business, which he had pursued since 1983. The damage will persist indefinitely into the future and has effectively precluded Petitioner from ever pursuing this occupation again.

d. Previous federal due process cases, regarding liens, attachments, and other provisional remedies, have turned on questions of the property interest being invaded. In the instant appeal, another equally important protected interest—the liberty interest—is invaded also. Thus, Petitioner claims the construction and meaning of the Due Process Clause makes it applicable also to situations where the lienee's liberty interest is invaded (whether he be the property owner at that moment of lien or not) by a false, libelous lien which names him improperly as lienee.

e. Virginia case law requires that for a lien to be valid, the lien must name the property owner of record.[53] The May 19, 1993, POA lien did not name the property owner of record (the property having been sold and the deed transferring title having been recorded over a month prior to the Defendants recording the POA lien). The *ex relatu* plaintiff Tysons Manor Homeowners Association did not file a new lien against the new property owner of record.

f. Thus, a three-fold effect is produced by such POA lien: (1) the lienee is libeled by a false, unlawful lien, invading his liberty interest, (2) the actual property owner is deprived of a significant property interest as his property is subjected to lien improperly, and (3) each is deprived of his Federal civil rights, protected under 42 USC §1983. The *ex relatu* plaintiff Tysons Manor HOA employed the May 19, 1993 POA lien as ancillary process, for prejudgment attachment.

As to the two June 28, 1994, POA liens—

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[53] In Virginia, a lien must be filed against the property owner of record, according to the holding of the Virginia Supreme Court in *Wallace v. Brumback*, 177 Va. 36, 12 S.E.2d 801 (1941).

7. a. Two constitutionally-protected private interests of persons affected by the June 28, 1994, POA liens are involved: a property interest and a liberty interest. The *ex relatu* plaintiff Sky Bryce Association, Inc., (hereinafter Sky Bryce POA) filed the two June 28, 1994 POA liens as ancillary processes, for prejudgment attachment, without predeprivation hearing, thus without Due Process to the Petitioner, as the property owner, and to the Petitioner, as lienee, and deprived the Petitioner, as the property owner, and deprived the Petitioner, as lienee, of two significant constitutionally-protected interests: (1) as a lien, by invading the property owner's (the Petitioner's) property interest, and (2) as a libelous lien, employed as ancillary process for prejudgment attachment, by invading the lienee's (the Petitioner's) liberty interest.[54]

b. *Ex relatu* plaintiff Sky Bryce POA filed the two partly false June 28, 1994, POA liens against Petitioner as named lienee, and as the property owner of record, and deprived the Petitioner, as *property owner*, of a significant, constitutionally-protected interest: his property interest; and as *lienee*, of another significant, constitutionally-protected interest: by a false, partiallt unlawful (therefore libelous) POA lien invading Petitioner's liberty interest

8. In the proceedings to date in Petitioner Breedlove's civil rights' suit under 42 USC §1983, against James H. Mihalik (past association president) and Sky Bryce Association, Inc., before the federal district court for the Western District of Virginia, in the report of the Honorable B. Waugh Crigler, U.S. Magistrate Judge, the federal magistrate stated:

> "[I]t is now established that prejudgment attachments implicate property interests protected by the Due Process Clause of the Fourteenth Amendment, thus requiring the court to turn to the three-factor test set forth in *Doehr* to

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[54] In hearing on January 31, 1996, in Fairfax County General District Court (in one of the two *ex relatu* action-in-debt cases by Sky Bryce Association, Inc., as plaintiff), the Fairfax trial judge granted Petitioner Breedlove's motion, by special appearance, to quash service and to dismiss the action in debt with prejudice on the grounds that the Circuit Court of Shenandoah County, Virginia, had prior exclusive, indisoluable jurisdiction to hear and decide all issues pertaining to the POA lien which the plaintiff Sky Bryce Association, Inc., had filed voluntarily among the land records of that circuit court, conferring the exclusive *in rem* jurisdiction of that circuit court.

> determine whether plaintiff has stated a claim upon which relief can be granted.[55]
>
> "Performing that analysis, the court first considers the private interest(s) that will be affected by the prejudgment measure; the plaintiff's alleged protected interests. Without question, those interests are in the nature of property rights in the subdivision lots, against which the homeowner's association [*Sky Bryce Association, Inc.*] assessments have become a lien. Under *Doehr*, they are significant enough to enjoy the protection of due process."[56]

9. Thus, the first factor of *the Mathews v. Eldridge, supra*, test—significant private interests are affected—is satisfied.

As to the Doehr-version of the second Mathews factor—

> **"...second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards..."** [*Connecticut v. Doehr, id.*, at 13.]

10. The Petitioner was not accorded due process by the Virginia property owners association lien law in the underlying *ex relatu* actions because "[D]ue Process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property or its unrestricted use." [*Sniadach v. Family Finance Corp., supra*, cited with approval in *Fuentes v. Shevin, id.*, at 579.]

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[55] Petitioner has filed numerous objections to the magistrate's report, including among others that it is not the three-part test of *Doehr* that determines whether Petitioner, as civil rights' plaintiff, has stated a cause of action pursuant to 42 USC §1983 but, rather, the federal case law interpreting 42 USC §1983, as found in the notes to 42 USCS §1983, which sets forth the necessary elements of a cause of action pursuant to 42 USC §1983, against which the Petitioner's civil rights' complaint must be evaluated.

[56] Petitioner's filed objections to the magistrate's report include also that Petitioner, as civil rights' plaintiff, alleged deprivation of four constitutionally-protected interests—a property interest, a liberty interest, an entitlement to Due Process, and an entitlement to Equal Protection under law—by the actions and property owners association liens of Sky Bryce Association, Inc., *et al.*

a. In the Tysons Manor HOA *ex relatu* action underlying this *appeal*, the underlying claim—that the Petitioner, as lienee of the May 19, 1993, POA lien, was indebted for the amount claimed, to the claimant lienor—Tysons Manor Homeowners Association—was *untrue.*

b. In the Sky Bryce POA *ex relatu* action underlying this appeal, the underlying claim—that the Petitioner, as lienee of the June 28, 1994, POA liens, was indebted for the amount claimed, to the claimant lienor—Sky Bryce Association, Inc.—was *untrue.*

11. The U. S. Supreme Court has held:

> "The right to prior notice and a hearing is central to the Constitution's command of due process. 'The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property...' *Fuentes v. Shevin*, 407 U.S. at 80-81, 92 S.Ct., at 1994-1995." [*U.S. v. James Daniel Good Real Property*, 114 S.Ct. 492, at 500-501 (1993).]

12. The Virginia POA lien law, *on its face*, and *as applied* in the instant POA liens complained of in the instant May 17, 1994, *Complaint*, denies the Petitioner, as property owner and as lienee, the minimum Due Process—notice and an opportunity to be heard, as set forth in ***Mullane**, supra*, and its progeny—and made applicable by ***Connecticut v. Doehr**, supra*, to "even the temporary or partial impairments to property rights that attachments, ***liens***, and other encumbrances entail."[57]

13. The *risk of erroneous (or malicious) deprivation* of constitutionally-protected private interests through the procedures provided in the Virginia POA lien statutes is substantial,

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[57] "To the contrary, our cases show that even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection. Without doubt, state procedures for creating and enforcing attachments, as with liens, 'are subject to the strictures of due process.'" [*Connecticut v. Doehr, id.*, at 14.]

as demonstrated herein, and the probable value of additional or substitute procedural safeguards included in the Virginia POA lien statutes, as demonstrated herein, was and is insufficient to mitigate that risk.

14. The *postdeprivation* safeguards which the Virginia POA lien statutes afford are insufficient and do not adequately reduce the risk of erroneous deprivation. In fact, in the instant May 19, 1993 POA lien, the burden of the erroneous, false, malicious deprivation fell upon an unsuspecting, subsequent owner of the property liened. The Virginia POA lien law, *on its face*, and *as applied* in the instant POA liens complained of in the instant May 17, 1994, *Complaint*, does not provide adequate provisions for safeguarding Due Process. Particularly lacking in the Virginia POA lien law are the following safeguards (flowing from *Connecticut v. Doehr, supra*):

a. Although the Virginia POA lien law, *on its face*, provides for prior notice of intent to lien (which is not the same as Due Process notice), there is no requirement for a showing that such notice was given to the lienee;

b. Notice of intent to lien is not synonomous with Due Process notice—that is, notice of the date and time where the lienee may appear to contect the POA lien;

c. The Virginia POA lien law, *on its face*, and *as applied* in the instant POA liens complained of in the instant May 17, 1994, *Complaint*, does not provide for a *predeprivation* hearing;

d. The Virginia POA lien law, *on its face*, and *as applied* in the instant POA liens complained of in the instant May 17, 1994, *Complaint*, does not provide for notice of a lien's filing to be served upon the property owner concurrently with the lien's filing;

e. The Virginia POA lien law, *on its face*, and *as applied* in the instant POA liens complained of in the instant May 17, 1994, *Complaint*, deprives an owner of the unrestricted use and full enjoyment of his property for an unreasonably long time. From the date the POA lien is filed, the lienor has two years in which to bring suit to enforce the lien; to that two years, add the time to adjudicate the suit to enforce the lien—during all of which time period the lienee/owner cannot free his property from the effects of that POA lien.

f. The Virginia POA lien law, *on its face*, and *as applied* in the instant POA liens complained of in the instant May 17, 1994, *Complaint*, does not provide for an early *postdeprivation* hearing. By comparison, the Virginia mechanics' lien law provides for a validity hearing, in accordance with *Virginia Code §43-17.1*, although not an *early* hearing, as set forth in *Connecticut v. Doehr, supra*, and even though the hearing is actually on the invalidity of the mechanics' lien, with the burden of proof actually falling upon the lienee/owner, there is no similar provision for challenging the POA lien in the Virginia POA lien law.

g. The Virginia POA lien law, *on its face*, and *as applied* in the instant POA liens complained of in the instant May 17, 1994, *Complaint*, does not provide that the lienee/property owner may free his property from the lien by posting a bond.

h. The Virginia POA lien law, *on its face*, and *as applied* in the instant POA liens complained of in the instant May 17, 1994, *Complaint*, does not provide a requirement that the *lienor* post a bond to protect the lienee against damages resulting from erroneous deprivation by erroneous, false, or fraudulent lien. There is no adequate method for redress for damages suffered by lienee as a result of erroneous, or fraudulent, or libelous liens.

i. The Virginia POA lien law, *on its face*, and *as applied* in the instant POA liens complained of in the instant May 17, 1994, *Complaint*, does not provide that the lien be issued under the supervision of a judge but, rather, provides that the recording of the lien is a ministerial function of a clerical employee in the Office of the Clerk of the Circuit Court, who admits the lien to record by endorsing the lien memorandum with the official *indicia* and attestation of the Clerk of the Circuit Court, as Recorder of Deeds, and the date of filing.

j. The Virginia POA lien law, *on its face*, and *as applied* in the instant POA liens complained of in the instant May 17, 1994, *Complaint*, does not provide that the lien *affidavit* contain sufficient substantive facts underlying conclusory allegations of the debt alleged, on which a judge could make a meaningful determination, even if such judge were to see the *memorandum of lien* prior to the lien attaching.

15. The *postdeprivation remedies for redress* of the damages attributable to false, or erroneous, or malicious POA liens complained of in the instant action, are inadequate, *on their face*, and *as applied* in the instant POA liens complained of in the instant May 17, 1994, *Complaint*, in that:

a. The unconstitutional Virginia property owners association lien law, particularly *Virginia Code §55-514* through *§55-516*, prescribes no requirement for a POA lienor to post a bond, prior to liening property, to compensate a lienee harmed improperly for damage as a consequence of the lien.

b. There are no *entitlements* or effective avenues within the Commonwealth of Virginia for redress for one deprived of constitutionally-protected rights and interests, or for one libeled or defamed or whose title is slandered by a false, erroneous, or malicious POA lien.

(1) Any action for libel or defamation of title would meet with a demurrer filed by the lienor, based upon *Donohoe Constr. Corp. v. Mount Vernon Assoc.*, 235 Va. 531, 369 S.E.2d 857 (1988), claiming absolute privilege for a POA lien as a judicial action equivalent to a mechanics' lien.

(2) *Donohoe, supra*, does not create an entitlement to a route of redress of damages through cause of action either for malicious prosecution or for abuse of process. Any avenues of redress for malicious prosecution or abuse of process would be blocked by the English rule, with the lienor claiming that the filing of a POA lien does not satisfy the English rule. Further, such avenues are impracticable for being far more costly to pursue than a plaintiff could hope to recover.

c. The unconstitutional Virginia property owners association lien law, particularly Virginia Code §55-514 through

§55-516, *on its face*, and *as applied* in the instant POA liens complained of in the instant May 17, 1994, *Complaint*, prescribes no procedure by which the lienee can controvert the validity of the lien and no procedure by which the lienee may have false liens removed from record (not merely released of record).

16. Thus, the Virginia POA lien statutes, *on their face*, and *as applied* in the instant POA liens complained of in the instant May 17, 1994, *Complaint*, fail the second factor of the *Mathews v. Eldridge, supra*, test—the risk of erroneous deprivation through the procedures under attack is significant and the probable value of additional or alternative safeguards is inadequate.

As to the Doehr-version of the third Mathews factor—

> **"...and third, in contrast to Mathews, principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or foregoing the added burden of providing greater protections."** [*Connecticut v. Doehr*, *id.*, at 13.]

17. a. The interest of the private party seeking the prejudgment remedy is not greater than the interests of the affected lienee/property owner, so as to outweigh the constitutionally-protected interests of the lienee/property owner being deprived of those interests:

(1) The interest of the POA lienor cannot be greater than the interest of the owner of the property and, until the lien attaches, the POA lienor has *no* interest in the prospective lienee/property owner's property. The lienor may be interested to collect the alleged debt, but the lienor has no interest in the lienee's property. The Virginia POA lien law does not invest the prospective POA-lienor property owners association with any form of ownership interest or inchoate interest in the properties of its property owner members, until the lien attaches.

(2) The interests of the lienor (May 19, 1993 lien: Tysons Manor HOA, et al.; June 28, 1994 liens: Sky Bryce POA) in

favor of an *ex parte* attachment of the POA lien are too minimal to diminish the need for a *predeprivation* hearing, especially as the Petitioner (a) was, and is, an in-state Virginia resident, (b) was an owner of other Virginia property at the time, and therefore, (c) was servable with notice by sheriff, so that there was no need to attach the *res*—the real properties—to obtain jurisdiction over Petitioner Breedlove.

(3) *Ex relatu* plaintiff Tysons Manor HOA never did bring any action against the new owner to enforce the May 19, 1993 POA lien they placed on the Fairfax County property, demonstrating that the *ex relatu* plaintiff's purpose for filing the May 19, 1993, POA lien was prejudgment attachment and collection by coercion.

(4) To date, *ex relatu* plaintiff Sky Bryce POA has not brought any action against Petitioner to enforce the June 28, 1994, POA liens they placed on the Petitioner's Shenandoah County properties, (in which enforcement suit the Petitioner, as lienee property owner, would be permitted to contest the unlawful-in-part, unconstitutional June 28, 1994, POA liens), demonstrating that the *ex relatu* plaintiff's purpose for filing the June 28, 1994, POA liens was prejudgment attachment and collection by coercion.

(5) Virginia case law requires that for a lien to be valid, the lien must name the property owner of record.[58] The May 19, 1993, POA lien did not name the property owner of record (the property having been sold and the deed transferring title having been recorded over a month prior to *ex relatu* plaintiff Tysons Manor HOA recording the May 19, 1993, POA lien). The *ex relatu* plaintiff Tysons Manor HOA did not file a new lien against the new property owner of record.

b. The state's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural Due Process requirement would entail, does not outweigh the constitutionally-protected interests of the lienee/property owner being deprived of those interests.

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[58] In Virginia, a lien must be filed against the property owner of record, according to the holding of the Virginia Supreme Court in *Wallace v. Brumback*, 177 Va. 36, 12 S.E.2d 801 (1941).

(1) The interest of the State cannot be greater than the interest of the POA lienor of the property and, until the lien attaches, the POA lienor has no interest in the prospective lienee's property.

(2) Were the Commonwealth of Virginia to intervene, the Commonwealth may well argue that the interests of the state are substantial in furthering the ability of property owners associations to collect amounts due to them, and that the Due-Process procedure of a predeprivation hearing would interfere with the efficient operation of these statutory POA lien procedures. But such argument is not well founded, as predeprivation hearings currently work well under the state mechanics' lien laws of Hawaii and Maryland.

(3) Furthermore, the United States Supreme Court has stated in *Fuentes v. Shevin:*

> "Procedural due process is not intended to promote efficiency or accomodate all possible interests; it is intended to protect the particular interests of the person whose possessions are about to be taken." [*Fuentes v. Shevin*, 407 U.S., at 90, 32 L.Ed.2d, at 576, note 22, 92 S.Ct. 1983 (1972)]

(4) If there is to be a judicial hearing on POA liens, either in Virginia's general district or circuit courts, the cost burden can be shouldered by court fees and costs, taxed as appropriate.

c. There were no exigent circumstances shown or present on the date the May 19, 1993 POA lien was filed by *ex relatu* plaintiff Tysons Manor HOA or on the date the two June 28, 1994, POA liens were filed by *ex relatu* plaintiff Sky Bryce POA, which would have mandated the need to by-pass a *predeprivation* hearing.

As to the May 19, 1993, lien—

(1) The prejudgment attachment of the May 19, 1993, POA lien occurred without a prior hearing, despite the following facts:

(a) The prejudgment attachment of the May 19, 1993, POA lien seized and held the *res*—the liened real property—in *custodia legis*, although such seizure was not directly necessary to secure an important governmental or general public interest.

(b) There was no special need for very prompt action, which would dictate the by-passing of a predeprivational hearing. Argument cannot be heard that a predeprivational hearing must be by-passed to prevent the prospective lienee from transferring the property, given advance warning (i.e., notice). A valid POA lien may be filed either before or after a property transfer and real estate is not subject to removal from the State court's jurisdiction (as a ship would be, in a matter of an attachment).

(c) The State—the Commonwealth of Virginia—did not keep strict control over its monopoly of legitimate force. The private parties (the *ex relatu* plaintiff Tysons Manor HOA) who initiated the prejudgment attachment of the May 19, 1993, POA lien, seizing and holding the property in non-possessory seizure, were not governmental officials responsible for determining, under the standards of a narrowly-drawn statute, that it was necessary and justified. In particular, the *ex relatu* plaintiff Tysons Manor HOA filed lien against the property of a third person, for a debt alleged against the Petitioner.

As to the two June 28, 1994, liens—

(2) The prejudgment attachment of the two June 28, 1994, Sky Bryce POA liens occurred without a prior hearing, despite the following facts:

(a) The prejudgment attachment of the two June 28, 1994, POA liens seized and held the *res*—the liened real properties—in *custodia legis*, although such seizure was not directly necessary to secure an important governmental or general public interest.

(b) There was no special need for very prompt action, which would dictate the by-passing of a predeprivational hearing. A valid lien may be filed either before or after a property transfer and real estate is not subject to removal from the State court's jurisdiction.

(c) The State—the Commonwealth of Virginia—did not keep strict control over its monopoly of legitimate force. The private parties (the *ex relatu* plaintiff Sky Bryce POA) who initiated the prejudgment attachment of the two June 28, 1994, POA liens, seizing and holding the properties in non-possessory seizure, were not governmental officials responsible for determining, under the standards of a narrowly-drawn statute, that it was necessary and justified.

18. The U.S. Supreme Court also stated in *Fuentes v. Shevin, supra*, its criteria for truly unusual situations in which a predeprivational hearing may be by-passed.[59] The circumstances of the instant underlying *ex relatu* actions do not satisfy the conditions for summary seizure of property.

19. The U.S. Supreme Court reaffirmed and strengthened its rationale in favor of predeprivation hearings, set forth in *Fuentes, supra*, in 1993 in ***U.S. v. James Daniel Good Real Property***.[60]

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[59] "First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a governmental official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. Thus, the Court has allowed summary seizure of property to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded food." [*Fuentes v. Shevin*, 407 U.S., at 91-92, 32 L.Ed.2d, at 576-577.]

[60] "In *Fuentes*, we held that the loss of kitchen appliances and household furniture was significant enough to warrant a predeprivation hearing. 497 U.S., at 70-71, 92 S.Ct., at 1989. And in *Connecticut v. Doehr*, — U.S. —, 111 S.Ct. 2105, 115 L.Ed.2d 1 (1991), we held that a state statute authorizing prejudgment attachment of real estate without prior notice or hearing was unconstitutional, in the absence of extraordinary circumstances, even though the attachment did not interfere with the owner's use or possession and did not affect, as a general matter, rentals from existing leaseholds." [*U.S. v. James Daniel Good Real Property*, — U.S., at —, — L.Ed.2d, at —, 114 S.Ct. 492, at 501 (1993).]

a. In the instant action, too, the prejudgment attachment of real estate by property owners association lien without prior notice or hearing is unconstitutional in the absence of extraordinary circumstances, even though the attachment of the property owners association lien *might* not interfere with the owner's use or possession and does not affect, as a general matter, rentals from existing leaseholds.

b. In the circumstances of the instant property owners association liens, the liens *did* and *do* interfere with the owner's use of the properties: (1) denying to the liened third-party property owner unencumbered transferability and unencumbered mortgageability, due to the May 19, 1993, POA lien; and (2) denying to the Petitioner, as liened property owner, unencumbered transferability and unencumbered mortgageability, due to the June 28, 1994, POA liens.

20. Thus, the Virginia POA lien statutes, *on their face*, and *as applied* in the instant POA liens complained of in the instant May 17, 1994, *Complaint*, fail the third factor of the *Mathews v. Eldridge, supra*, test—principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or foregoing the added burden of providing greater protection do not outweigh the need to safeguard the constitutionally-protected interests of the lienee/property owner by due process.

21. By the three-part judicial test of *Mathews v. Eldridge, supra*, as modified for private-party-initiated deprivations in *Connecticut v. Doehr, supra*, the Virginia property owners association lien law, particularly *Virginia Code §55-514* through *§55-516*, *on its face*, and *as applied* in the instant POA liens complained of in the instant May 17, 1994, *Complaint*, **is and was unconstitutional.**

Exhibit 17 ***Relevant Cases Regarding 28 USC §2284***[61]

The following cases are found in the notes to 28 USCS §2284:

a. "Whenever petition to convene three-judge court pursuant to 28 USC §2284 is filed, original inquiry must be whether complaint complies with requirements for statute involved." [*Federacion de Cooperativas de Credito v. Burgos*, 366 F.Supp. 1321 (DC Puerto Rico, 1973).][62]

b. "When application for statutory three-judge court is addressed to district court, its inquiry is limited to determine whether constitutional question raised is substantial, whether complaint at least formally alleges basis for equitable relief, and if these criteria are met, it is impermissible for single judge to decide merits of the case, either by granting or by withholding relief." [*Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 8 L.Ed.2d 794, 82 S.Ct. 1294 (1962).][63]

c. "Single district judge, when faced with request to convene three-judge court, cannot resolve factual issues by use of summary judgment procedure in affidavits; he cannot delve deeper than phase of pleadings in reaching that determination." [*Dale v. Hahn*, 440 F.2d 633 (C.A.2, N.Y., 1971), 14 FR Serv 2d 1196, later app (C.A.2, N.Y.) 486 F.2d 76, cert den 419 U.S. 826, 42 L.Ed.2d 50, 95 S.Ct. 44.][64]

d. "District Court's preliminary inquiry is limited to determining whether constitutional question raised is substantial, whether complaint at least formally alleges basis for equitable relief, and whether case otherwise comes within requirements of three-judge statute." [*Noe v. True*, 507 F.2d 9, 19 FR Serv 2d 646 (C.A.6, Ky., 1974).][65]

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[61] Exhibit 17 shows the holdings requiring specific judicial processing of a complaint making formal request for a three-judge district court, which the trial court ignored and which the Fourth Circuit court failed either to comply with or to distinguish the instant action from these federal case law holdings. The trial judge failed either to call to her assistance two other judges or to limit her inquiry to a determination of whether the constitutional question raised is substantial, whether the complaint at least formally alleges basis for equitable relief. If these criteria are met, it is impermissible for a single judge to decide merits of the case, either by granting or by withholding relief.

[62] *28 USCS §2284*, note 1, "Generally," at page 308.

[63] *Op. cit.*, note 9, "Initial screening of applications," at page 311.

[64] *Op. cit.*, note 9, page 311.

e. "District judge to whom application for three-judge is presented has authority to determine only jurisdictional questions, and may examine merits solely to determine whether substantial federal question is presented." [*Collins v. Bolton*, 287 F.Supp 393, 12 FR Serv 2d 442 (N.D., Ill., 1968.][66]

f. "Single judge to whom application is made to convene three-judge District Court under 28 USC §2284 is not at liberty to rule on merits of claim, if such claim presents substantial constitutional questions." [*Simkins v. Gressette*, 494 F.Supp. 1075 (D.C. S.C., 1980), affd 631 F.2d 287 (C.A.4, S.C).][67]

g. "Under former 28 USC §2284(5) [now § 2284(b)(3)], if in fact substantial constitutional question has been presented, single trial judge has no authority to dismiss case." [*Hartmann v. Scott*, 488 F.2d 1215 (C.A.8, Minn., 1973).][68]

h. "If court was warranted in taking jurisdiction and case fell within 28 USCS §2284, single judge was not authorized to dismiss complaint on merits, whatever his opinion of merits might have been." [*New Jersey Chiropractic Assoc. v. State Bd. of Medical Examiners,* 79 F.Supp. 327 (D.C., N.J., 1948).][69]

i. "There is no requirement in 28 USC §2284 that applicant for injunction must determine need for three-judge court and make request therefor; it was legislative intention that district judge to whom application for injunction is presented must determine whether it is three-judge case or single-judge matter and take necessary action under §2284." [*Aaron v. Cooper*, 261 F.2d 97 (C.A.8, Ark., 1959).][70]

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[65] *Op. cit.*, note 9, page 311.
[66] *Op. cit.*, note 9, page 312.
[67] *Op. cit.*, note 9, page 312.
[68] *Op. cit.*, note 10, "Dismissal of applications," at page 312.
[69] *Op. cit.*, note 10, page 313.

j. "After request for three-judge court is made, and unless single judge determines that three-judge court is not appropriate, proper procedure is for three-judge court to determine whether claim has merit." [*Backus v. Spears*, 677 F.2d 397 (C.A.4, S.C., 1982).][71]

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[70] *Op. cit.*, note 13, "Request for three-judge court [28 USC §2284(b)(1)]," at page 313.

[71] *Op. cit.*, note 13, page 314.

Exhibit 18 Excerpt of Document, entitled Transcript of Motion Proceedings, on February 10, 1995, Proceedings[72]

1. The relevant oral proceedings in the February 10, 1995, motion proceedings on the Petitioner's noticed and docketed *Complainant's Motion for Certification to Attorney General of Virginia, Pursuant to 28 USC §2403 (b), of Constitutional Challenge to Virginia Property Owners Association Act*, dated January 27, 1995, are set forth below, quoted from the purported *transcript*, which is reproduced in its entirety in Petitioner's *Brief for the Appellant*, dated July 29, 1995, at pages A73-A79.[73]

a. " P-R-O-C-E-E-D-I-N-G-S"

b. "THE CLERK; Civil Action Number 94-639-A; Kendall H. Breedlove vs. Tysons Manor Homeowners Association and others."

c. "THE COURT: Mr. Breedlove, you are here pro se, correct?"

d. "MR. BREEDLOVE: That is correct, Your Honor."

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[72] Exhibit 18 shows the effect of the trial judge creating the appearance of a *bi partes* suit in the oral proceedings in a dismissal hearing, of which the Petitioner would presumably have had notice, from which the Petitioner, as complainant, would likely take an appeal and would likely order a transcript. In fact: (1) the hearing was noticed by Petitioner for his motion for the court to comply with 28 USC §2403 (b); (2) the Petitioner had been given no show cause order as to why his complaint should not be dismissed for want of notice jurisdiction of the court, but was caught totally by surprise; and (3) the trial judge was holding a hearing on an *ex parte* action for declaratory relief, not a *bi partes* lawsuit.

[73] Petitioner asserts that the purchased copy of the document, entitled transcript of motion proceedings, furnished to Petitioner and Filed with the trial court by the court reporter is not an accurate record of the oral proceedings of February 10, 1995. Petitioner asserts that the document, purporting to be verbatim transcript is, in fact, an inaccurate and false embodiment of the February 10, 1995, oral proceedings. Petitioner has already detailed the circumstances of the falsified transcript of the February 10, 1995, hearing in motion of June 20, 1995, to the Fourth Circuit court of appeals, entitled, *Appellant's Motion (a) Objecting Under F.R.E. 902 to Admissibility of District Court's Two Docket Summaries and Two Transmittal Sheets into Evidence; (b) For the Clerk of the Fourth Circuit Court of Appeals To Effect Correction of the Unattested, Tampered District Court Record (Lacking the 28 USC §1738 Authentication of the Clerk of the Federal District Court); and (c) for Writ of Certiorari to Federal District Court for Complete Record*, in Attachment G, thereto, at pages A-40 – A-49.

e. "THE COURT: All right. Mr. Breedlove, I have looked carefully at the file in this case.

f. "Looking across the courtroom, I see there are no defendants here.

g. "The problem is, your case has never been served; or if it has been served, I should say, it's been served on people who are not named or entities that are not named as defendants in this case.

h. "You have sued a homeowners association, and you have sued, basically, I think who you intended to sue, but you served the Attorney General.[74]

i. "But the bottom line is, your complaint is completely inconsistent with who you have attempted to serve. That is why there are no defendants in this case. There is no motion to dismiss that's been filed. There is no answer. There's no nothing. You don't even have a scheduling order in this case, and yet this complaint was filed on May 17.

j. "So what I'm doing is, because there is actually no lawsuit in front of me, as far as I'm concerned, is I am dismissing your suit, this complaint as it is filed, because it's not been served on the named defendants in the case."[75]

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[74] Petitioner did not sue a homeowners association in the instant *ex parte* action. Petitioner sought declaratory relief as to the constitutionality of Virginia property owner association lien law, in accordance with the holding of the U.S. Supreme Court in ***Connecticut v. Doehr, supra.*** Petitioner notified the Attorney General of Virginia and the Governor of Virginia by certified mail with copies of the May 17, 1994, ***Complaint***, in good-faith compliance with the intent of constitutional due process and comporting with 28 USC §2403 (b), for notification of the attorney general of a state when that state's statute is challenged constitutionally in federal court, and when no officer or official of the state is named as a party defendant — which are the circumstances of the instant *ex parte* action. And, the February 10, 1995, hearing was noticed as an *ex parte* action to the Attorney General of Virginia (as a potentially-interested party) and docketed by the trial court as a *bi partes* suit for hearing of Petitioner's motion for the trial court to comply with 28 USC §2403 (b). The trial court failed to rule on Petitioner's motion for 28 USC §2403 (b) compliance, and failed *sua sponte* to fulfill the duties of a federal court pursuant to 28 USC §2403 (b), which are mandatory and are not subject to any judicial discretion.

k. "MR. BREEDLOVE: May I speak, our Honor?"

l. "THE COURT: Very briefly, yes, sir."

m. "MR. BREEDLOVE: Your Honor, this case comes on on an *ex parte* action out of two suits, which are in the General District Court of Fairfax County, and out of the Circuit Court of Shenandoah County. I am seeking *ex parte*, a declaration of the constitutionality of the Virginia Property Owners Association Act and several of its subsidiary statutes."

n. "THE COURT: I understand what you are seeking, but what I'm saying to you is, this is not procedurally the correct vehicle with which you can do it."

o. "MR. BREEDLOVE: Ma'am, if I may cite *ex parte* Paresky [*sic*, correctly: *Ex Parte PORESKY, supra*], in which the United States Supreme Court held that, on *ex parte* action, without any defendants, a citizen of Massachusetts was entitled to obtain a declaration as to whether or not the Massachusetts Compulsory Automobile Insurance Law was constitutional.

p. "I am following in the holding of *ex parte* Paresky [*sic*] which was a 1933 case, which has never been changed."

q. "THE COURT: All right. Well, you may be, but I'm still dismissing this suit as it's filed sua sponte, because I am finding that there is no basis for this case to remain on the Court's docket.

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[75] Petitioner, as complainant, did not name any defendants but, rather, brought the instant action *ex parte*, not as a *bi partes* lawsuit. To review the caption of the instant action, as filed, **see** copy of the front-page caption of the May 17, 1994, ***Complaint***, at Exhibit 1, *ante*. Petitioner sought no relief in the May 17, 1994, ***Complaint***, against the underlying *ex relatu* plaintiffs—Tysons Manor Homeowners Association and Sky Bryce Association, Inc.—in the instant *ex parte* action for declaration as to the constitutionality of a Virginia statute. The trial judge's statement that there is no lawsuit before her was correct; there was before her an *ex parte* action for declaratory relief by declaration as to the constitutionality of Virginia lien statutes.

r. "If you want to refocus your complaint or bring in some new defendants [*you may refile*] -- but I'm not going to continue this case on the docket, and that's my ruling. If your should wish to take an appeal, you may do so."[76]

s. "MR. BREEDLOVE: Thank you, ma'am."

t. "(Whereupon, the proceedings in the above-captioned matter were concluded.)" [*document captioned "Kendall H. Breedlove v. Tysons Manor Homeowners Association, et al.," entitled: "Transcript of motion proceedings," on February 10, 1995, page 3, lines 5 – 25, page 4, lines 1 –25, page 5, lines 1 – 10.*][77]

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[76] Petitioner asserts that the purported transcript of the February 10, 1995, hearing has been tampered and falsified by the omission of the phrase—"you may refile"—from line 5, page 5, at the double dash (--), which phrase Petitioner asserts was part of the oral proceedings, was transcribed onto the stenotype machine paper tape by the court reporter, but was not transcribed into the transcript.

[77] Petitioner had been unsuccessful, after two written requests, in purchasing from the court reporter a certified copy of the paper-tape output media from the reporter's stenotype machine, with which the Petitioner could have independent verification of the accuracy of the transcriptions of the oral proceedings of February 10, 1995, and of March 10, 1995. Petitioner asserts that following Petitioner's June 20, 1995, motion to the Fourth Circuit court of appeals, concerning in part the tampered transcripts, that the court reporter had failed and refused to file with the court until July 7, 1995, the originals of the two documents purporting to be transcripts, or any other transcripts of the two hearings, despite an April 4, 1995, follow-up letter to the court reporter from the Clerk of the Fourth Circuit, dated June 23, 1995, stating that the June 5, 1995, due date for the filing of the transcripts had been passed, that sanctions were imposed on the reporter, and directing filing of the transcripts by June 23, 1995. And, Petitioner's motion to the Fourth Circuit court to appoint a magistrate with power to issue ***subpoena duces tecum*** to obtain the copies of the original paper-tape stenotype media, was denied.

Exhibit 19 Excerpt of Document, entitled Transcript of Motion Proceedings, on March 10, 1995[78]

1. The relevant oral proceedings in the March 10, 1995, motion proceedings on the Petitioner's noticed and docketed *Complainant's Motion to Vacate February 10, 1995, Order*, dated March 1, 1995, are set forth below, quoted from the purported *transcript*, which is reproduced in its entirety in Petitioner's *Brief for the Appellant*, dated July 29, 1995, at pages A80-A85.[79]

a. "P-R-O-C-E-E-D-I-N-G-S"

b. "THE CLERK; Civil Action Number 94-639-A; Kendall H. Breedlove vs. Tysons Manor Homeowners Association and others."

c. "THE COURT: Mr. Breedlove, come forward, please.

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[78] Exhibit 19 shows the trial judge ruling on Petitioner's motion before permitting Petitioner to speak even a single word, then instructing Petitioner not to argue his motion, when he is allowed to utter a one-sentence paragraph.

a. Thus, Petitioner was not permitted the procedural due process of having a transcript record of his oral arguments in support of his motion, which oral argument would have highlighted the reasons why the instant *ex parte* action should not be dismissed for want of notice jurisdiction.

b. Petitioner filed his *notice of appeal* timely as to the February 10, 1995, dismissal, 10 minutes after leaving the courtroom, on March 10, 1995, within the 30-day period for filing appeal. To appreciate fully the effect of not allowing Petitioner to argue in support of his motion, one must understand that the office of the Clerk initially recorded Petitioner's *notice of appeal* as being filed on ***March 20, 1995***, and transmitted that misrepresentation to the Fourth Circuit court, in the transmittal of the record on appeal on March 21, 1995 (falsely purported by Jennifer L. Wilson, deputy clerk, as being certified). March 20, 1995, would have been too late as a filing date (more than 30 days from dismissal) for Petitioner to reach the February 10, 1995, dismissal hearing and its transcript of argument.

[79] Petitioner asserts that the copy of the document, entitled transcript of motion proceedings, may not be an accurate record of the oral proceedings of March 10, 1995. Petitioner asserts that the document, purporting to be verbatim transcript may, in fact, be an inaccurate embodiment of the March 10, 1995, oral proceedings. Petitioner has already detailed the circumstances of the falsified transcript of the February 10, 1995, hearing and, perhaps, of the March 10, 1995, hearing in motion of June 20, 1995, to the Fourth Circuit court of appeals, entitled, *Appellant's Motion (a) Objecting Under F.R.E. 902 to Admissibility of District Court's Two Docket Summaries and Two Transmittal Sheets into Evidence; (b) For the Clerk of the Fourth Circuit Court of Appeals To Effect Correction of the Unattested, Tampered District Court Record (Lacking the 28 USC §1738 Authentication of the Clerk of the Federal District Court); and (c) for Writ of Certiorari to Federal District Court for Complete Record*, in Attachment G, thereto, at pages A-40 – A-49.

d. "I understand this is your request for this court to vacate a February 10, 1995, order in which I dismissed your action. As a courtesy to you, because you are pro se, I allowed this to be placed on the docket.

e. "But I must tell you what I told you last time, and that is, that this Court may only hear cases in controversy, and this is not either a case or a controversy.

f. "You did not bring in any defendants in this case, and, as this complaint was presented to this Court, there is simply no basis upon which it could be left on the docket. That's why it was dismissed.[80]

g. "There is nothing in your praecipe or notice or the memorandum that supports that to change. I'm not granting any of this. I have already dismissed the case. It is dismissed. All right.[81]

h. "I felt that it was easier for me to just tell that to you in person than to try to write some long response to your documents. [82] So you have got your record.

i. "If you wish to note an appeal, that is your right to take this to the Fourth Circuit. I'm not reconsidering my ruling from February 10."

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[80] With the dismissal of the action, the trial court failed to rule on or to enter dispositive order as to ***Complainant's Motion For the Court to Comply with the Procedures of 28 USC §2284 (b) for Determinations and Convening of Three-Judge Court***, dated January 30, 1995, and noticed by ***praecipe and notice***, dated January 30, 1995, for hearing on February 17, 1995.

[81] The trial judge misstated the facts of the proceeding; Petitioner did not file a memorandum. Petitioner filed ***Complainant's Motion to Vacate February 10, 1995, Order***, dated March 1, 1995, and ***Praecipe and Notice***, dated March 3, 1995. This March 1, 1995, motion was transmitted by the federal district court to the Fourth Circuit court, in the record on appeal, itemized in the civil docket summary as item 12, and included in the record-on-appeal file as tab 12 therein. However, this tab 12 motion, in its entirety, was missing (with its tab noticably missing from the progression of tab cuts) from the record-on-appeal file when Petitioner examined the record-on-appeal file for the instant action in the offices of the Clerk of the Fourth Circuit on January 23, 1996, at 3:06 pm, on the same date as, but prior to, the January 23, 1996, release of the ***opinion*** by the Fourth Circuit.

[82] The trial court failed to rule on or to enter dispositive order as to ***Complainant's Motion for Written, Published, Self-Contained Memorandum Opinion of the Court's Findings, Rulings, and Decision***, dated September 15, 1994.

j. "MR. BREEDLOVE: May I speak, Your Honor?"

k. "THE COURT: I'll give you a moment or two, but that's all. I don't want you to be arguing your motion, because I have already read it; and, as I said, I'm not going to reconsider that motion -- that ruling."[83]

l. "MR. BREEDLOVE: This Court lacked jurisdiction on February 10, 1995, for a single judge to dismiss the instant action for any reason, because the single judge failed to make the written determinations required by 28 USC, Section 2284 and its associated Federal Case Law, and failed to convene a three-judge court when a three-judge District Court was requested in the complaint, which pleaded substantive cons[t]itutional questions and basis for equitable relief in accordance with 28 USC 2284, *Idylwild Bon Voyage Liquor Corporation vs. Epstein*, 370 U.S. 713, 1962; and *Backus vs Speers*, 677 F. 2d 397, Fourth Circuit Court of Appeals, 1982."

m. "THE COURT: Thank you, sir. You have that on the record."

n. "MR. BREEDLOVE: Thank you, Your Honor."

o. "THE COURT: Yes, sir."

t. "(Whereupon, the proceedings in the above-captioned matter were concluded.)" [*document captioned "Kendall H. Breedlove v. Tysons Manor Homeowners Association, et al.," entitled: "Transcript of motion proceedings," on March 10, 1995, page 5, lines 1 – 25, page 6, lines 1 –25.*]

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[83] The trial judge refers to reading the motion to vacate, which is the tab 12 motion which disappeared from the record on appeal prior to the issuance of the January 23, 1996,. *opinion* decision, while entrusted to the custody and safekeeping of the Clerk of the Fourth Circuit. For details of the disappearance, see paragraph 19. g, at page 14, *ante*. To read the motion to vacate, see Appendix Exhibit 20, *post*.

Exhibit 20 ***Copy of Complainant's Motion to Vacate February 10, 1995, Order***

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Ex Parte KENDALL H. BREEDLOVE, :
:
Complainant, :
:
ex rel., : Civil Action,
: File No. 94-639-A
Tysons Manor Homeowners Association:
v. Breedlove, :
:
ex rel., :
:
Sky Bryce Association, Inc. :
v. Breedlove, :

COMPLAINANT'S MOTION TO VACATE FEBRUARY 10, 1995, ORDER

Complainant Kendall H. Breedlove, *pro se*, hereby moves this Court to vacate the Court's February 10, 1995, *dismissal order*. In support of this motion Complainant states:

1. Complainant has a right—completely independent of any other persons' rights and completely independent of any adverse effects on other persons—to be accorded Equal Protection under law and to be accorded Due Process, in accordance with the Fourteenth Amendment of the United States Constitution and with Article I, §11, of the Virginia Constitution. Those rights, guaranteed by the the Fourteenth Amendment of the United States Constitution and with Article I, §11, of the Virginia Constitution, ***cannot*** be abridged lawfully. Those rights of Complainant exist without regard to the effect their existence may have on other persons, particularly the adverse-party litigants in the underlying *ex relatu* litigation. Thus, Complainant has the right in *ex parte* action to challenge the constitutionality of Virginia state laws, in accordance with 28

USC §2201, the Declaratory Judgment Act, as Complainant has done in his *Complaint*, when Complainant has been subjected to those laws and customs.

2. Neither this Court, nor any Court, has the power to impose adverse parties (as the adverse-party litigants in the underlying *ex relatu* litigation would be in this action) between the Complainant and a determination of his constitutional rights. The question of whether Complainant's constitutional rights have been abridged by Virginia law or by Virginia judicial custom exists for judicial determination by declaratory judgment without regard to the subsequent effect such determination may have upon any other person or persons

3. Complainant has filed the instant action as an *ex parte* proceeding. As such proceeding is *ex parte*, there is no obligation or requirement to institute service of process on any party to either of the underlying *ex relatu* court actions, as the principles of *ex parte* actions are stated in the quotations below:

> a. "An ex parte proceeding is a proceeding at the instance and for the benefit of one party only and without notice to, or contestation by, any person adversely interested; it necessarily presupposes a right of petitioner to which there is no adverse party." [*State v. Dickmann*, 157 S.W. 1012, 124 Mp.App. 653, cited in 1A, *C.J.S.*, "Actions," §7 b, at 321.]
>
> b. "A term applied to proceedings in an action had on application or at instance of one side only, and without notice or opportunity to oppose given to other side, and to proceedings in which there is no adverse party." [*Ex parte Covington*, 195 S.W. 439, 176 Ky. 140, cited in 1A, *C.J.S.*, "Actions," §7 b, at 321.]
>
> c. "'Ex parte proceedings' are proceedings had at the instance or for benefit of one side, or of one party only, without notice to or contest by any person adversely affected, or in the absence of opposing parties." [*In re Bowlus' Will*, 416 P.2d 711, 197 Kan. 351, cited in 1A, *C.J.S.*, "Actions," §7 b, at 321.]

d. "An ex parte proceeding is one brought for the benefit of one party only and without notice to the other party or an opportunity for that party to be heard." [*Gallagher v. Swiatek*, 435 N.E.2d 1287, 62 Ill.Dec. 315, 106 Ill.App.3d 417 and *Wilson-Jump Co. v. McCarthy-Hundrieser and Associates, Inc.*, 405 N.E.2d 1322, 40 Ill.Dec. 230, 85 Ill.App.3d 179, cited in 1A, *C.J.S.*, "Actions," §7 b, at 321.]

e. "'Ex parte proceeding' is one in which relief is obtained by one party without notice to or opportunity to contest being given to other parties who will be bound or directly affected by the proceeding." [*White v. State*, 457 P.2d 650 (Alaska), cited in 1A, *C.J.S.*, "Actions," §7 b, at 321.]

f. "An ex parte proceeding is one requested by one party without notice to or presence of the opposing party." [*United States v. Garries*, 22 M.J. 288, at 291 (CMA, 1986).]

4. In particular, for any opposing party in the underlying *ex relatu* actions to be present in the instant *ex parte* action would prejudice Complainant's in-process appeal to the federal court of appeals for the Fourth Circuit, in that parts of Complainant's theories of his cases would be laid open to the scrutiny of the opposing parties. To permit, or worse, to require that service be made upon opposing parties in the underlying *ex relatu* actions and that they participate in the instant *ex parte* action, would be contrary to the holding of *United States v. Merriwether*, as set forth in the following quotation:

> "The government asserts that *ex parte* means only that the prosecutor should not participate in the discussions about the subpoenas, although he may be present during the argument. But this interpretation of the rule conflicts with both the general understanding of the term *ex parte*, and with the purpose of the 1966 amendment to the rule. Black's Law Dictionery (4th Ed., 1968) defines *ex parte* as meaning: 'On one side only; by or for one party; done for, in behalf of, or on the application of, one party only.'

> " '*In its more usual sense, ex parte* means that an application is made by one party to a proceeding *in the absence of* the other. [Emphasis added.]' In addition, we would defeat the purpose of the amendment to the rule is we upheld the government's contention. The *ex parte* provision of the rule was not intended to protect the defendant from opposition from the prosecutor; it was intended to shield the theory of his defense from the prosecutor's scrutiny. Allowing the prosecutor to observe the defendant's support of his motion permits this scrutiny, even when the prosecutor remains silent." [*United States v. Merriwether*, 486 F.2d 498, at 505-506 (CA 5th Cir., 1973).]

5. Complainant states that in the instant *ex parte* action he has no requirement to serve process upon any plaintiff to the underlying *ex relatu* litigation, or to furnish them notice. Even if they come to know of this instant ex parte action, the *ex relatu* plaintiffs are not permitted to contest it. Further, Complainant states that participation by such *ex relatu* plaintiffs would prejudice his pending appeal.

6. The Complainant did not name the adverse parties in the underlying *ex relatu* suits as defendants in the instant *ex parte* action. The Court has not declared those adverse parties in the underlying *ex relatu* suits to be defendants in the instant *ex parte* action and the Court did not join those adverse parties as necessary defendants in the instant *ex parte* action, pursuant to F. R. Civ. P. 19. As a consequence, it is improper for the Court to dismiss based on Complainant's alleged failure to serve these adverse parties in the underlying *ex relatu* suits.

7. *Arguendo*, even if those adverse parties parties in the underlying *ex relatu* suits were to have been declared or joined as necessary parties defendant by the Court in the instant *ex parte* action, the dismissal order could properly be only as to the declared or joined defendant parties, for failure to serve those parties, pursuant to F. R. Civ. P. 4 (j), and not as to the Complainant in the instant *ex parte* action for judgment on the constitutionality of the Virginia Property Owners Association Act.

WHEREFORE, the Plaintiff prays this Court to vacate the Court's February 10, 1995, dismissal *order*; and to grant summary judgment in favor of the Complainant, pursuant to *FRCP* Rule 56; if there be any deficiencies in Complainant's pleadings, Complainant prays leave to amend them; together with such other and further relief as may seem proper to the Court.

Respectfully submitted,

(signed) *Kendall H. Breedlove*

Kendall H. Breedlove
2831 Gallows Road, Suite 145
Falls Church, VA 22042

CERTIFICATE

The undersigned hereby certifies that he caused one copy of the foregoing **Complainant's Motion to Vacate February 10, 1995, Order** to be sent as notice by first-class mail, postage prepaid, to the Governor and the Attorney General of Virginia, addressed to them at the following addresses:

The Honorable George Allen
Governor of the Commonwealth of Virginia
State Capitol Building – Capitol Square
Richmond, Virginia 23219

The Honorable James S. Gilmore, III (via certified, return receipt requested)
Attorney General of Virginia
Supreme Court Building
101 N. 8th Street
Richmond, Virginia 23219

on this 1st of March, 1995.

(signed) *Kendall H. Breedlove*

Kendall H. Breedlove, *pro se*

2831 Gallows Road, Suite 145
Falls Church, VA 22042

Exhibit 21 Authority for Petitioner's civil rights under 28 USC 2403 (b)

1. The provisions of 28 USC §2403 (b) state, in part:

> "(b) **In any action**, suit, or proceeding in a court of the United States **to which a State or any agency, officer, or employee thereof is not a party**, wherein the constitutionality of any statute of that State affecting the public interest is drawn into question, **the court shall certify such fact to the attorney general of the State**, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. * * *" [*bold emphasis added by Petitioner to 28 USC §2403 (b).*]

2. The provisions of Fed. R. App. P. 44 state, in part:

> "It shall be the duty of a party who draws into question the constitutionality of any Act of Congress in any proceeding in a court of appeals ... to give immediate notice in writing to the court of the existence of said question. **The clerk shall thereupon certify such fact to the Attorney General**." [*bold emphasis added by Petitioner to Fed. R. App. P. 44.*]

3. The instant *Brief for the Appellant*, dated July 29, 1995, makes clear in writing at pages 1, 16, and 37-38, that the Petitioner prays for the Virginia property owners association lien law, *on its face* and *by its application*, to be held violative of the Due Process Clauses of the Fourteenth Amendment of the U.S. Constitution and of Article I, §11, of the Virginia Constitution.

4. The *Sworn Petition for Rehearing*, dated February 2, 1996, makes clear in writing at pages 1, 2, and 10, that Petitioner has raised a constitutional challenge to the Virginia property owners association lien law, and complains at paragraph 8, page 3, and paragraph VI. 1, pages 8-9, that the Clerk of the Fourth

Circuit has failed to comply with 28 USC §2403 (b), to certify the challenge and to notify the Attorney General of Virginia.

5. In the instant *ex parte* action and appeal, the Clerk of the Fourth Circuit twice failed to notify the Attorney General of Virginia, pursuant to 28 USC §2403 (b) and Fed. R. App. P. 44, of the pendency of an action containing a constitutional challenge to one or more Virginia statutes. The Clerk's failure to comply with 28 USC §2403(b) and Fed. R. App. P. 44 occurred on two occasions: (1) upon the Petitioner's filing of the ***Brief for the Appellant***, dated July 29, 1995,; and (2) upon the Petitioner's filing of the ***Sworn Petition for Rehearing***, dated February 2, 1996.

6. By comparison, in Petitioner's prior *ex parte* action in C.A.4 docket number 95-1071, challenging the constitutionality of the Virginia mechanics' lien law, appealed to the Fourth Circuit court, the Clerk of the Fourth Circuit issued a letter dated February 28, 1995, notifying the Attorney General of Virginia pursuant to 28 USC §2403 (b) of the pendency of the appeal raising a constitutional challenge to one or more Virginia statutes and forwarding a copy of the ***Brief for the Appellant***, dated February 21, 1995, to the Attorney General of Virginia, and did so within seven days after Petitioner filed his ***Brief for the Appellant***, dated February 21, 1995, in that case.

Exhibit 22 ***Virginia Property Owners Association Lien Law***

Copy of *Virginia Code §55-514* through *§55-516*
follows this page.

4. The amount of unpaid assessments currently due or past due relative to such lot together with the date when each fell due;

5. The date of issuance of the memorandum;

6. The name of the association and the name and current address of the person to contact to arrange for payment or release of the lien; and

7. A statement that the association is obtaining a lien in accordance with the provisions of the Virginia Property Owners' Association Act as set forth in Chapter 26 (§ 55-508 et seq.) of Title 55.

It shall be the duty of the clerk in whose office such memorandum shall be filed as hereinafter provided to record and index the same as provided in subsection D, in the names of the persons identified therein as well as in the name of the association. The cost of recording and releasing the memorandum shall be taxed against the person found liable in any judgment or decree enforcing such lien.

C. Prior to filing a memorandum of lien, a written notice shall be sent to the property owner by certified mail, at the property owner's last known address, informing the property owner that a memorandum of lien will be filed in the circuit court clerk's office of the applicable city or county. The notice shall be sent at least ten days before the actual filing date of the memorandum of lien.

D. Notwithstanding any other provision of this section, or any other provision of law requiring documents to be recorded in the miscellaneous lien books or the deed books in the clerk's office of any court, on or after July 1, 1989, all memoranda of liens arising under this section shall be recorded in the deed books in the clerk's office. Any memorandum shall be indexed in the general index to deeds, and the general index shall identify the lien as a lien for lot assessments.

E. No suit to enforce any lien perfected under subsection B shall be brought after twenty-four months from the time when the memorandum of lien was recorded; however, the filing of a petition to enforce any such lien in any suit wherein the petition may be properly filed shall be regarded as the institution of a suit under this section. Nothing herein shall extend the time within which any such lien may be perfected.

F. The judgment or decree in an action brought pursuant to this section shall include, without limitation, reimbursement for costs and reasonable attorney's fees, together with interest at the maximum lawful rate for the sums secured by the lien from the time each such sum became due and payable.

G. When payment or satisfaction is made of a debt secured by the lien perfected by subsection B hereof, the lien shall be released in accordance with the provisions of § 55-66.3. For the purposes of § 55-66.3 the principal officer of the association, or any other officer or officers as the declaration may specify, shall be deemed the duly authorized agent of the lien creditor.

H. Nothing in this section shall be construed to prohibit actions at law to recover sums for which subsection A hereof creates a lien, maintainable pursuant to § 55-515. (1989, c. 679; 1991, c. 667.)

The 1991 amendment, in subsection B, substituted "twelve months" for "six months" in the first paragraph and inserted "Virginia" in subdivision 7; substituted "the general index" for "such general index" in subsection D; added present subsection F; redesignated former subsections F and G as present subsections G and H; and in present subsection G, substituted "the lien shall be released" for "said lien shall be released" in the first sentence and substituted "any other officer or officers" for "such other officer or officers" in the second sentence.

development which is a common area shall not be denied the member. (1989, c. 679; 1991, c. 667; 1992, c. 450.)

The 1991 amendment substituted "the" for "such" throughout the section; in subsection A, deleted "periodic" preceding "special assessment" in the first sentence, substituted "A majority of votes cast, in person or by proxy, at a meeting of the membership convened in accordance with the provisions of the association's bylaws within sixty days of promulgation of the notice of the assessment shall rescind the special assessment" for "Any such special assessment may be rescinded by majority vote of the members attending a meeting of the membership convened in accordance with the provisions of the association's declaration within sixty days of receipt of the notice of such assessment" in the second sentence and added the third sentence; and substituted "the member" for "said member" in the second sentence of subsection C.

The 1992 amendment inserted "or reduce" near the end of the second sentence of subsection A.

§ 55-515. Compliance with declaration. — A. Every lot owner, and all those entitled to occupy a lot shall comply with all lawful provisions of this chapter and all provisions of the declaration. Any lack of such compliance shall be grounds for an action or suit to recover sums due, for damages or injunctive relief, or for any other remedy available at law or in equity, maintainable by the association, or by its executive organ or any managing agent on behalf of such association, or in any proper case, by one or more aggrieved lot owners on their own behalf or as a class action. The prevailing party shall be entitled to recover reasonable attorneys' fees and costs expended in the matter.

B. A declaration may provide for arbitration of disputes or other means of alternative dispute resolution. Any such arbitration held in accordance with this subsection shall be consistent with the provisions of this chapter and Chapter 21 (§ 8.01-577 et seq.) of Title 8.01. The place of any such arbitration or alternative dispute resolution shall be in the county or city in which the development is located, or as mutually agreed to by the parties. (1989, c. 679; 1993, c. 956.)

The 1993 amendment added the subsection A designation and added subsection B.

§ 55-516. Lien for assessments. — A. Once perfected, the association shall have a lien on every lot for unpaid assessments levied against that lot in accordance with the provisions of this chapter and all lawful provisions of the declaration. The lien, once perfected, shall be prior to all other subsequent liens and encumbrances except (i) real estate tax liens on that lot, (ii) liens and encumbrances recorded prior to the recordation of the declaration, and (iii) sums unpaid on and owing under any mortgage or deed of trust recorded prior to the perfection of said lien. The provisions of this subsection shall not affect the priority of mechanics' and materialmen's liens. Notice of a memorandum of lien to a holder of a credit line deed of trust under § 55-58.2 shall be given in the same fashion as if the association's lien were a judgment.

B. The association, in order to perfect the lien given by this section, shall file before the expiration of twelve months from the time such assessment became due and payable in the clerk's office in the county or city in which such development is situated, a memorandum, verified by the oath of the principal officer of the association, or such other officer or officers as the declaration may specify, which contains the following:

1. The name of the development;
2. A description of the lot;
3. The name or names of the persons constituting the owners of that lot;

of votes cast, in person or by proxy, at a meeting convened in accordance with the provisions of the association's bylaws and called for that purpose, shall repeal or amend any rule or regulation adopted by the board of directors. Rules and regulations may be enforced by any method normally available to the owner of private property in Virginia, including, but not limited to, application for injunctive relief or damages, during which the court may award to the association court costs and reasonable attorneys' fees.

B. The board of directors of the association shall also have the power, to the extent the declaration or rules and regulations duly adopted pursuant thereto expressly so provide, to (i) suspend a member's right to use facilities or nonessential services offered by the association for nonpayment of assessments to the extent that access to the lot through the common areas is not precluded and (ii) assess charges against any member for any violation of the declaration or rules and regulations for which the member or his family members, tenants, guests, or other invitees are responsible. Before any such charges may be assessed, the member shall be given an opportunity to be heard and to be represented by counsel before the board of directors or other tribunal specified in the documents. Notice of a hearing shall be hand delivered or mailed by registered or certified mail, return receipt requested, to the member at the address of record with the association at least fourteen days prior to the hearing. The amount of any charges so assessed shall not exceed fifty dollars for a single offense or ten dollars per day for any offense of a continuing nature and shall be treated as an assessment against the member's lot for the purposes of § 55-516. (1989, c. 679; 1991, c. 667; 1993, c. 956.)

The 1991 amendment, in the third sentence of subsection A, substituted "A majority of votes cast, in person or by proxy" for "The members of the association may, by a majority of the members present in person or by proxy," substituted "association's bylaws" for "association's declaration" and inserted "shall"; and rewrote subsection B.

The 1993 amendment inserted clause (i), and added the clause (ii) designation in subsection B.

§ 55-514. Authority to levy special assessments. — A. In addition to all other assessments which are authorized in the declaration, the board of directors of an association shall have the power to levy a special assessment against its members if the purpose in so doing is found by the board to be in the best interests of the association and the proceeds of the assessment are used primarily for the maintenance and upkeep, including capital expenditures, of the common area. A majority of votes cast, in person or by proxy, at a meeting of the membership convened in accordance with the provisions of the association's bylaws within sixty days of promulgation of the notice of the assessment shall rescind or reduce the special assessment. No director or officer of the association shall be liable for failure to perform his fiduciary duty if a special assessment for the funds necessary for the director or officer to perform his fiduciary duty is rescinded by the owners pursuant to this section, and the association shall indemnify such director or officer against any damage resulting from any claimed breach of fiduciary duty arising therefrom.

B. The failure of a member to pay the special assessment allowed by subsection A shall entitle the association to the lien provided by § 55-516 as well as any other rights afforded a creditor under law.

C. The failure of a member to pay the special assessment allowed by subsection A will provide the association with the right to deny the member access to any or all of the common areas. Notwithstanding the immediately preceding sentence, direct access to the member's lot over any road within the